

**THE TASMANIAN SMALL CLAIMS COURT:
AN EMPIRICAL STUDY**

Edward by

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This thesis contains no material which has been accepted for the award of any other higher degree or graduate diploma in any other university, and to the best of my knowledge and belief contains no material previously published or written by another person, except where due reference is made in the text.

E. Eugene Clark

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ABSTRACT

This dissertation presents the results of an empirical study of the Tasmanian Small Claims Court, established in 1985. The major purpose of the study was to evaluate the extent to which the Court is effective in achieving the purpose for which it was designed--the informal, speedy and inexpensive resolution of minor civil disputes.

In conducting the evaluation a multiple evaluation methodology was adopted which sought to illuminate the diverse perceptions of various groups--disputants, community organisations, Magistrates, and court officials--all of whom are involved with the Small Claims Court. The individual components of the methodology incorporated: (1) a detailed literature survey of Small Claims Courts within the wider context of dispute resolution; (2) a historical sketch of the establishment of a Small Claims Court in Tasmania; (3) a file survey of Small Claims Court records for the fiscal year 1989; (4) a survey of disputants who utilised the Small Claims Court over the period from 1 July 1988 through 30 June 1989; (5) interviews with disputants, court staff, administrators, magistrates and community organisations such as the Hobart Community Legal Service, Legal Aid, and Consumer Affairs; (6) personal observation of approximately thirty cases; and (7) participant observation in conducting my own case before the Small Claims Court.

The empirical data present a detailed account of how Tasmanian Small Claims disputants perceive and utilise the Small Claims Court. Included in this account are the types of claims filed and by whom; the amount claimed; the role played by lawyers and insurance companies in giving advice; the perceived helpfulness of court staff; the disposition of cases; the nature of settlements; the perceived degree of formality and privacy, disputant satisfaction with the Court and their perceptions of the Court's strengths and weaknesses; problems of enforcement; and a description of the demographic characteristics of those who utilise the Small Claims procedure. The study further analyses the Court from the perspective of magistrates, court officials and community groups who all have various degrees of involvement with the Small Claims Court.

The principal finding of the study is that the Tasmanian Small Claims Court is, to a large extent, achieving the goals for which it was established. More civil cases are tried in Small Claims than any other court; the vast majority of

disputants are satisfied with the system and would use it again; the court staff are considered helpful; and for most litigants there is the appropriate degree of privacy and informality. The major factor influencing disputants' attitudes of fairness, impartiality and general satisfaction with the Court was whether or not disputants felt there was an adequate opportunity to present their side of the case.

However, it was found that some areas of the Court's operation could be improved, the major recommendations being: 1) the need for greater public awareness about Small Claims; 2) more education regarding the primary mediation function of the Court; 3) closer working relationships between the Small Claims Court and other less formal dispute resolution agencies; 4) specialised training for Small Claims staff and Magistrates; 5) court forms and brochures written in plain English; and 6) improved physical facilities more conducive to the informal atmosphere required of small claims actions.

Finally, the study highlights the need for systematic, ongoing evaluation of the Small Claims Court with the aim of making further refinements to ensure that, in pursuing the goal of providing a speedy, inexpensive and informal method of resolving minor civil disputes, the rhetoric of Small Claims Court dispute resolution matches the reality.

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TABLE OF CONTENTS

Abstract	iii
Acknowledgements	v
Table of Contents	vii
Table of Cases	xvi
Table of Statutes	xvii
List of Tables	xiv
List of Appendices	xxviii

CHAPTER ONE

INTRODUCTION TO THE STUDY	1
1.1 Introduction	1
1.2 Organisation of Discussion	2
1.3 A Brief History of the Evolution of Special Courts and Tribunals to Handle Small Claims	3
1.4 Development of Small Claims Procedures in Australia generally and specifically in Tasmania	11
1.5 Questions Investigated	15

CHAPTER TWO

SMALL CLAIMS COURTS AND TRIBUNALS IN OTHER COUNTRIES	17
2.1 Introduction	17
2.2 Historical and Comparative Development and Growth of Special Procedures to Handle Small Claims ..	17
2.3 Research from other Countries: Basis for Selection	19
2.4 Development of Small Claims Systems in England and Wales	20
2.4.1 Description of the System for Handling Small Claims	20
2.4.2 Small Claims Research in England and Wales	24
2.5 Small Claims Systems in the United States	29
2.5.1 Description of Small Claims Systems	29
2.5.2 Research on United States	30
2.6 Development of Small Claims Courts in Canada	37

2.6.1	Description of Canadian Small Claims Systems	38
2.6.2	Research on Small Claims Courts in Canada	39
2.7	Development of Small Claims Tribunals in New Zealand	41
2.7.1	Description of the System	42
2.7.2	New Zealand Research on Small Claims	44
2.8	Conclusion	46

CHAPTER THREE

DEVELOPMENT AND MAJOR FEATURES OF SMALL CLAIMS COURTS AND TRIBUNALS IN AUSTRALIA GENERALLY AND TASMANIA SPECIFICALLY		47
3.1	Overview	47
3.2	Jurisdiction	49
3.3	Emphasis on Conciliation/Mediation	52
3.4	Small Claims Procedures	53
3.5	A Description of the Tasmanian Small Claim Court System	60
3.5.1	Introduction	60
3.5.2	Administration	60
3.5.3	Jurisdiction of Small Claims Division	62
3.5.4	Filing of the Claim; Notice of Hearing; Deposit with Registrar; Summons	63
3.5.5	Joinder	65
3.5.6	Functions of the Magistrate	65
3.5.7	Consent Orders, Registrar's Conference	66
3.5.8	Hearing and Determination of Small Claims	67
3.5.9	Contempt Powers	70
3.5.10	Orders, Appeals, Enforcement	70
3.6	Research on Australian Small Claims Courts and Tribunals	71
3.6.1	Non-empirical Research	72
3.6.2	Empirical Research on Small Claims in Australia	73
3.7	Conclusion	75

CHAPTER FOUR

CENTRAL THEMES AND EMERGING ISSUES IN SMALL CLAIMS RESEARCH	77
4.1 Introduction	77
4.2 Contextual Issues Impacting Small Claims Courts and Tribunals	78
4.2.1 The Need to View Small Claims in the Wider Context of Dispute Resolution	78
4.2.2 Small Claims within the Broader Context of Judicial Administration	85
4.3 Issues Specific to Small Claims Courts and Tribunals	93
4.3.1 Court or Tribunal?	93
4.3.2 Jurisdiction of Small Claims Courts and Tribunals	96
4.3.3 Costs of justice	97
4.3.4 Delays	97
4.3.5 Small Claims Are Not Necessarily Simple Claims	98
4.3.6 Small Claims Courts for Whom?	99
4.3.7 Access Issues: Constraints which Prevent Maximum Use of Small Claims Courts and Tribunals	103
4.3.8 Role of Lawyers/Need for Legal Advice	109
4.3.9 Formality vs Informality: Rule of Law and Related Issues	112
4.3.10 Conciliation/Mediation vs Adjudication	118
4.3.11 Role and Qualifications of the Adjudicator and Court Staff	120
4.3.12 Enforcement	123
4.3.13 Disputant Satisfaction: Public Expectations and Small Claims Court Realities	124
4.4 Evaluation Theory and Practice	126
4.4.1 Importance of Evaluation	126
4.4.2 Multi-purpose Role of Small Claims Systems Evaluations	127
4.4.3 Evaluation to Determine How the Small Claims Systems is Working	127
4.4.4 Accountability	127
4.4.5 A Plurality of Evaluation Paradigms	129
4.4.6 Methodological Problems Inherent in Small Claims Court/Tribunal Evaluation	131
4.4.7 Taking into Account the Evolutionary rather than Revolutionary Development of Small Claims Courts and Tribunals	131
4.5 Conclusion	132

CHAPTER FIVE

METHODOLOGY	135
5.1 Introduction	135
5.2 Existing Paradigms of Court Research	136
5.3 Rationale of the Tasmanian Small Claims Court Study	140
5.4 Methodological Components	145
5.5 Limitations of the Study	151

CHAPTER SIX

PRESENTATION AND ANALYSIS OF RESULTS	154
6.1 Introduction	154
6.2 Purpose and Goals of the Tasmanian Small Claims Court	156
6.3 Access to Justice Issues and the Small Claims Court	157
6.3.1 In General	157
6.3.2 Awareness of Small Claims Procedures	159
6.3.3 Psychological Access	162
6.3.4 Access for Particular Groups	163
6.3.5 Financial Barriers to Access/convenience	168
6.3.6 Physical Barriers to Access: the Location of the Court	169
6.3.7 Suggestions to Improve Access	170
6.3.8 Summary	171
6.4 Filing of the Claim, Transfers from Court of Requests, Joinder	174
6.4.1 Length of Dispute	174
6.4.2 Help Obtained for Settling the Dispute	175
6.4.3 Suggestion to Go to Small Claims Court	178
6.4.4 Whether Dispute Would Have Been Taken to Court of Requests	180
6.4.5 Method of Filing Claim	182
6.4.6 Assistance Provided by Court Staff	184
6.4.7 Whether More Assistance Required	187
6.4.8 Transfers from the Court of Requests	189

6.4.9	Party Joined	190
6.4.10	Service of Process	191
6.4.11	Summary	191
6.5	Nature of Claims filed in Small Claims Court	194
6.5.1	Introduction	194
6.5.2	Number of Claims Filed	194
6.5.3	Types of Claim Filed	195
6.5.4	Amount of the Claim	196
6.5.5	The Disputants	197
6.5.6	Summary	201
6.6	Defaults, Dismissals and Pre-trial Settlements	205
6.6.1	Overview of Case Disposition	205
6.6.2	Non-Attendance of the Claimant or Respondent	206
6.6.3	Application for a Rehearing	208
6.6.4	Number of Cases Settled	210
6.6.5	Registrars' Conferences	211
6.6.6	Pre-hearing Settlement	214
6.6.7	Advantages of Mediation/Conciliation	218
6.6.8	Differing Expectations Regarding Settlement	221
6.6.9	Agreed vs Imposed Decisions	225
6.6.10	Problems with Mediation/Settlement	225
6.6.11	Disputant Perceptions about Compromise and Settlement	229
6.6.12	How Good Was the Magistrate in Bringing About Settlement?	231
6.6.13	Need for Specialised Training	233
6.6.14	Relationship of Small Claims to other Dispute Resolution Procedures	235
6.6.15	Summary	236
6.7	Hearing	240
6.7.1	Role of the Magistrate	240
6.7.2	The Disputants: Preparation for the Hearing	244
6.7.3	Involvement of Lawyers in Small Claims	246

6.7.4	Insurance Representatives	252
6.7.5	Representation by Friends and Others	259
6.7.6	Knowledge and Use of Witnesses	259
6.7.7	Privacy of Hearing	261
6.7.8	Informality of Hearing	262
6.7.9	Opportunity to Present Case/Rules of Evidence	267
6.7.10	Magistrate/Commissioner's Fairness in Controlling the Hearing	275
6.7.11	Record of the Proceedings	276
6.7.12	Summary	276
6.8	Convenience	280
6.8.1	Convenience in Attending Hearing	280
6.8.2	The Relationship of Convenience to Disputant Satisfaction with Small Claims	282
6.8.3	Arrangements with Work	283
6.8.4	Arrangements for Children	284
6.8.5	Desirability of Night or Saturday Court Sitzings	286
6.8.6	Physical Aspects	287
6.8.7	Summary	289
6.9	The Outcome	291
6.9.1	Outcome by Agreement or Decision	291
6.9.2	Reasons Provided for the Decision	292
6.9.3	Explanation for Reasons	294
6.9.4	Disputants' Perception of the Outcome	295
6.9.5	Type of Order in Favour	296
6.9.6	Perceived Fairness of Outcome	296
6.9.7	Result of Hearing	297
6.9.8	Summary	300
6.10	After the Hearing: Appeals and Enforcement	302
6.10.1	Appeals Against the Order	302
6.10.2	Available Remedies	303
6.10.3	Collection of Judgments	304

6.10.4	Enforcement of Settlement Agreements	311
6.10.5	Summary	312
6.11	The Disputants	315
6.11.1	Previous Involvement with Small Claims Courts and the Court of Requests	315
6.11.2	Demographic Characteristics of Disputants	316
6.11.3	Summary and Conclusion	324
6.12	Overall Opinion and Disputant Satisfaction with Small Claims	327
6.12.1	Difficulties in Measuring User Satisfaction	327
6.12.2	Opinion of Magistrates and Court Staff	328
6.12.3	General Satisfaction Level of Small Claims Disputants	328
6.12.4	Reasons for Negative Rating	330
6.12.5	Variants of Satisfaction	331
6.12.6	Positive Aspects of the Small Claims Court	337
6.12.7	Negative Aspects of the Small Claims Court	339
6.12.8	Suggestions for Improving Small Claims Court	340
6.12.9	Summary	342
6.13	Administration of Small Claims	344
6.13.1	Intra and Inter Court Governance	344
6.13.2	The Relationship of the Small Claims Court to Other Dispute Resolution Bodies	344
6.13.3	Jurisdiction of the Small Claims Court	345
6.13.4	Class Actions/Groups Proceedings/Standing	347
6.13.5	Filing of a Claim; Definition of 'Claim'	349
6.13.6	Costs of Filing	350
6.13.7	Scheduling the Hearing	350
6.13.8	Court Personnel: Training	353
6.13.9	Helping Small Claims Disputants to Help Themselves	356
6.13.10	Magistrates	363
6.13.11	Enforcement and Collection of Judgments	370
6.13.12	Small Claims Courts and Computerisation	371
6.13.13	Evaluation	376

6.13.14 Summary 377

CHAPTER SEVEN

IMPLICATIONS AND RECOMMENDATIONS 380

7.1 Philosophy and Purpose of Small Claims 380

7.2 Access 381

7.2.1 Physical Aspects 381

7.2.2 Adequate Information and Advice about Small Claims 382

7.2.3 Financial Barriers to Access 384

7.2.4 Procedural Barriers to Access 384

7.3 Consumer Participation 385

7.4 Jurisdiction 386

7.5 Settlement 386

7.6 Court Staff 389

7.7 Magistrates 389

7.8 Administration 390

7.8.1 Regular Meetings 390

7.8.2 Rejection of Claims 391

7.8.3 Scheduling 391

7.8.4 Record Keeping/Statistics 391

7.8.5 Enforcement 391

7.8.6 Establishing Relationships with Other Dispute Resolution Agencies 392

7.8.7 Regular Evaluation 392

7.8.8 Greater Responsibility Given to the Magistrates and Court Staff 392

7.8.9 More Resources and a Long-term Commitment to Improvement 393

CHAPTER EIGHT

CONCLUSION 394

8.1 Introduction 394

8.2 Contextual Issues Impacting Small Claims Courts and Tribunals 394

8.2.1	Small Claims in the Wider Context of Dispute Resolution	394
8.2.2	Small Claims within the Broader Context of Judicial Administration	397
8.3	Issues Specific to Small Claims Courts and Tribunals	400
8.3.1	Court or Tribunal?	400
8.3.2	Jurisdiction of Small Claims Courts and Tribunals	400
8.3.3	Costs of Justice	401
8.3.4	Delays	402
8.3.5	Small Claims Are Not Necessarily Simple Claims	402
8.3.6	Small Claims Courts for Whom?	403
8.3.7	Access Issues: Constraints which Prevent Maximum Use of Small Claims Courts and Tribunals	405
8.3.8	Role of Lawyers/Need for Legal Advice	407
8.3.9	Formality vs Informality: Rule of Law and Related Issues	408
8.3.10	Conciliation and Mediation vs Adjudication	409
8.3.11	Role and Qualifications of the Adjudicator and Court Staff	411
8.3.12	Enforcement	412
8.3.13	Disputant Satisfaction: Public Expectations and Small Claims Court Realities	413
8.4	The Process of Evaluation: Waves of Reforms and Counterreforms	414
BIBLIOGRAPHY		417

TABLE OF CASES

Bishop v Bridgelands Securities Ltd (1990) ATPR 41-060
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- s. 17(2)
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- s. 25(4)
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- s. 26(2)
- s. 26(2)(b)
- s. 27
- s. 28(3)
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D. C. Code Ann s. 16-3901 (1981 Supp & Supp. 1988)

Wisconsin

Wis. Stat. s. 799.01 (1985-86)

Wyoming

Wyo. Stat s. 1-21-201 (1988)

LIST OF TABLES

1. Response rates	150
2. Birthplace/Nationality of claimants	164
3. Years in Australia	164
4. Birthplace/Nationality of respondents	165
5. Highest level of education	167
6. Employment status of disputants	168
7. Length of time claimants were aware of dispute	174
8. Length of time respondents were aware of dispute	175
9. Whether disputants asked for help or advice	176
10. To whom claimants went for help or advice	177
11. To whom did respondents go for help or advice	178
12. Who suggested Small Claims	179
13. Whether claimant would have gone to the Court of Requests if no Small Claims	181
13a Why claimant would not have gone to the Court of Requests if no Small Claims	182
14. Method of filing the claim	183
15. How helpful disputants thought the Court staff were	184
16. Did respondent ask for help or advice	185
17. Whether disputants wanted more help or advice	188
18. Transfers from Court of Requests to Small Claims	189
19. Cases in which party was Joined	190
20. Growth in number of cases heard	194
21. Cases filed per calendar year	194
22. Types of cases filed	195
23. Amount of claim	196
24. Nature of persons Involved	199
25. Type of claimant by amount claimed	200
26. Nature of Claim by amount claimed	201
27. Ex Parte hearings	207
28. Did respondent appear	208
29. Did claimant appear	208
30. Did disputant apply for a rehearing	209
31. Percentage of cases settled	210
32. What disputants wanted to happen: decision or agreement	222
33. Did disputants make up minds before hand what they wanted to happen	229
34. Did disputants compromise more than intended	230
35. Did disputants compromise more than was fair	230

36. Was Magistrate good at settlement	232
37. Claimants' reasons why Magistrate not good at settlement	232
38. Respondents' reasons why Magistrate not good at settlement	233
39. How prepared were disputants for the hearing	244
40. Did disputants go to lawyer for advice	246
41. Helpfulness of advice from lawyers	247
42. If they did not go to a lawyer, would it have been helpful	247
43. Should lawyers be permitted in Small Claims	250
44. Whether insurance company participated	257
45. Was participation by insurance company an advantage	258
46. Claimants' reasons why insurance company was advantage/disadvantage	258
47. Respondents' reasons why insurance company was advantage/disadvantage	258
48. Whether disputants knew they could have witnesses at hearings	260
49. Whether disputants called a witness	260
50. Was the witness to their advantage	261
51. Whether disputants were aware that other party had a witness	261
52. Degree of privacy of hearing	262
53. Importance that hearings be private	262
54. Degree of informality of hearing	264
55. Importance that hearings be informal	264
56. Did disputants have opportunity to present their case	273
57. Why claimants stated no opportunity to present case	274
58. Why respondents stated no opportunity to present case	274
59. How fair was Magistrate in controlling the hearing	275
60. Why claimants said Magistrate not good at controlling hearing	275
61. Why Respondents said Magistrate not good at controlling hearing	276
62. Convenience of hearing	281
63. Why claimants thought hearing was inconvenient	281
64. Why respondents thought hearing was inconvenient	283
65. Convenience by satisfaction rating	282
66. Whether disputants took time off from paid employment	283
67. Number of Hours taken off paid employment	284
68. Whether disputants took Annual leave in order to attend	284
69. Whether disputant lost pay by attending Small Claims	284
70. Was child care required	285
71. How many hours of child care required	285
72. Percentage in favour of night sittings for Small Claims	286
73. Percentage in favour of Saturday sittings	287

74. Disputants' perception of outcome of the hearing	291
75. Did Magistrate give reasons for decision	293
76. How well did Magistrate explain his reasons	295
77. Was the final order in your favour	296
78. Type of order in favour of the disputant	296
79. How fair was the outcome	297
80. Amount of the award	298
81. Award as a percentage of the amount claimed	299
82. Disputant awareness of limitations on appeal	303
83. Was the order complied with	307
84. Length of time for claimant to comply with order	308
85. Length of time for respondent to comply with order	308
86. Whether any steps were taken to enforce the order	308
87. Reasons, why no enforcement steps taken	309
88. Claimant: type of order not in favour	309
89. Respondent: type of order not in favour	310
90. Whether disputants complied with the order	310
91. Was an enforcement order taken out against you	311
92 Repeat users	315
92a. Gender of disputants	317
93. Marital status of disputants	318
94. Employment status	319
95. Family income of disputants	320
96. Educational status of disputants	321
97. Spouses' occupation	321
98. Age of disputants	322
99. Birthplace/nationality of claimants	323
100. Years in Australia: claimants	323
101. Birthplace/nationality of respondents	323
102. How satisfied were disputants	329
103. Would disputants use Small Claims again	330
104. Claimants reasons for not using Small Claims again	330
105. Respondents reasons for not using Small Claims again	331
106. Response to various success variables	333
107. Phi coefficients of success	334
108. Effect of satisfaction on other variables	337
109. Claimants' view of strengths/advantages of Small Claims	338
110. Respondents' view of strengths/advantages	338

111. Claimants' views of weaknesses/disadvantages of the system_____339

112. Respondents' views of weaknesses/disadvantages of the system_____340

113. Claimants' suggestions for improvement_____341

114. Respondents' suggestions for improvement_____341

115. Delay from date of filing of claim to setting of hearing_____353

LIST OF APPENDICES

A. Tasmanian Small Claims Court Forms

1. General Claim Form	452
2. Motor Vehicle Accident Claim Form	453
3. Letter to Respondent filing a Defence	454
4. Notice of Hearing	455
5. Notice to Attend (sent to interested parties)	456
6. Notice of Conference Before District Registrar	457
7. Important Notice to Parties (regarding the Hearing)	458
7A New Form (designed after the present study)	459
8. Notice of Order (old form)	460
8A. New Notice of Order form	461
9. Warrant of Execution	462
10. Order Ex parte for Attachment of Salary	463
11. Affidavit for Salary Attachment	464
12. Notice of Rehearing	465

B. Small Claims Brochure

466

C. Disputants' Survey

471

1. Notes on Methodology	472
2. Claimant Survey (those attending hearing) yellow	
3. Claimant Survey (those who settled prior to hearing) white	
4. Respondent Survey (those attending hearing) blue	
5. Respondent Survey (those whose case settled prior to hearing) green	
6. Survey Letter	524
7. Follow-up Letter	525

D. Survey of Small Claims Files: Note on Methodology

526

E. Summary of Interviews

527

F. Small Claims Court Observations: Physical Aspects

585

Chapter 1

INTRODUCTION TO THE STUDY

1.1 Introduction

In every society there is a wide range of alternatives for coping with the conflict stirred by personal disputes. Litigation is only one choice among many possibilities, ranging from avoidance to violence. The varieties of dispute settlement, and the socially sanctioned choices in any culture, communicate the ideals people cherish, their perceptions of themselves, and the quality of their relationships with others. They indicate whether people wish to avoid or encourage conflict, suppress it, or resolve it amicably. Ultimately the most basic values of society are revealed in its dispute-settlement procedures. Although every society provides institutions for dispute settlement, by no means are these necessarily, or exclusively, legal institutions. Conceptions of the role of law change, and assessments of the advantages and disadvantages of submitting disputes to its processes not only shift, but exist in perpetual tension.¹

The aim of this thesis is to evaluate the effectiveness of the Tasmanian Small Claims Court, a vehicle for dispute resolution ideologically and practically poised between the traditional adversary system and more informal means of dispute resolution, characterised by such innovations as Neighbourhood Justice Centres. As such, the Small Claims Court epitomises the 'tension' referred to in the quote above.

As Shakespeare noted in *King Lear*: 'Ripeness is all.' Such a study was 'ripe' to be undertaken at this time for several reasons. First, when the study began, the Tasmanian Small Claims system had been operating for five years. Thus, there existed a need for an evaluation of the extent to which the system has achieved its goal of

¹ J. Auerbach, *Justice Without Law* (1983) (New York, Oxford University Press) 4-5; Cameron, J., 'Evaluating the "Quality of Justice" Provided by the Christchurch Community Mediation Service' in J. Mugford (ed), *Alternative Dispute Resolution* (July 1986) (AIC Seminar: Proceedings No. 15) (Canberra, ACT, Australian Institute of Criminology) 151.

providing a mechanism for the inexpensive, speedy and informal adjudication of minor civil disputes. Second, the large number of disputants utilising the Small Claims Court also justified a careful study of its operation. Since its inception, the Small Claims division has evolved into one the State's busiest Courts, hearing more cases than either the Court of Requests or the Supreme Court. Tasmanians are more likely to come into contact with the Small Claims Court than any other civil Court. Third, the position of Small Claims Courts, situated as they are at the cross-roads between alternative dispute resolution mechanisms and formal judicial dispute resolution, also made the Tasmanian system worthy of study. For example, one of the chief questions which the present study seeks to answer is: Is the Small Claims system a preferred alternative to the traditional adversary system; or, does it offer a system of 'rough' justice in which the abandonment of traditional procedural guarantees is viewed with concern and even alarm? Fourth, this study hopefully provides the data necessary for evaluating and enhancing the overall performance of the Tasmanian Small Claims Court. To date there has been no empirical analysis. This lack of information has been a major impediment to improvement. Finally, various social, political and economic factors--the consumer movement, demands for greater governmental accountability; calls for greater efficiency on the part of all public institutions; concerns about the cost of justice, claims of elitism on the part of lawyers and the legal system, and so on - also made a study of the Small Claims Court both timely and relevant.

1.2 Organisation of Discussion

Following this introductory chapter, the next three chapters place the Tasmanian Small Claims Study in context. Chapter 2 presents a review of the Small Claims literature in England, North America, Europe and New Zealand, which developments were influential in the subsequent adoption of a Small Claims Court in Tasmania. Chapter 3 describes the growth and development of Small Claims procedures in Australia generally and in Tasmania specifically. Chapter 4 attempts a synthesis of key themes or emerging issues which derive from the comparative study of Small Claims developments overseas and in Australia. With these themes as a basis, Chapter 5, describes and presents the rationale for the methodology employed in the present study. Chapter 6 incorporates the presentation and analysis of results. Chapter 7 presents a summary of major implications and recommendations for reform which flow from the findings. Finally, Chapter 8 concludes with a general overview of the critical issues raised by the evaluation as well as an overall appraisal of the Tasmanian Small Claims Court. The Appendix contains the survey instruments, Court forms, and summary of the interviews from the present study.

1.3 A Brief History of the Evolution of Special Courts and Tribunals to Handle Small Claims

Access to Justice Movement

The search for and interest in 'alternatives' to formal Court litigation, though not a recent development, is one which has become an integral part of a world-wide access to justice movement.² These alternatives have taken the form of Small Claims Courts or Tribunals, arbitration, conciliation and mediation, mini-trials and similar mechanisms, often classified under the umbrella of alternative dispute resolution (ADR's).³ One of the oldest and most popular of these 'alternatives' has been the development of special systems to better handle minor disputes.⁴ In the last ten years the focus has shifted away from Small Claims Courts and Tribunals to even more informal dispute resolution mechanisms such as conciliation and mediation.⁵ This recent emphasis on ADR's, however, does not detract from the importance of Small Claims Courts and Tribunals because they continue to be the one judicial forum with which the average citizen is likely to come into contact. Indeed, Small Claims Courts

² See e.g., M. Cappelletti and B. Garth (eds), *Access to Justice: A World Survey* (1978) (Alphenasandenrijn: Sijthoff and Noordhoof); M. Cappelletti and B. Garth (eds), 'Access to Justice: the Newest Wave in the Worldwide Movement to Make Rights Effective', 27 *Buffalo Law Review* 181; M. Cappelletti, B. Garth, and J. Weisner (eds) *Access to Justice: Promising Institutions* (1979) (Alphenasandenrijn: Sijthoff and Noordhoof); M. Cappelletti, *Judicial Review in the Contemporary World* (1971) (London, Bobbs-Merrill).

³ There is no universally accepted definition of 'alternative dispute resolution.' Indeed, the adjective 'alternative' is in some respects misleading because a small claims court is not an alternative; rather it is part of the system of formal justice. Moreover, increasingly, courts themselves in pre-trial procedures and other ways are employing conciliation, and arbitration. These points are discussed below. See P. Dwight, 'Commercial Dispute Resolution in Australia: Some Trends and Misconceptions' (1989) 1(1) *Bond Law Review* 1.

⁴ See e.g., Awan, Malike Muhamad Rashid, *The Provincial Small Cause Courts Act 1987* (Pakistan): *Commentary and Cases* (1990) (Lahore, Lahore Law Times Publications); I. M. Bredenkamp, *The Small Claims Court* (1986) (Durban, South Africa, Butterworths); B. Demeulenaere, *Sweden's system to Resolve Consumer Disputes* (1983) (Stockholm, Institutet for immaterialrhatt och marknadsrhatt vid Stocholms Universitet); K. O-gon, 'Small Claims Courts in Korea and the U.S.: A Comparative Analysis', unpublished LLM thesis, Harvard University, 1985; P. Oxley, *Small Claims Court Evaluation* (1986) (Wellington, NZ, Policy and Research Division, Dept of Justice); N. M. Padfield, 'Small Civil Claims - Commonwealth Variations' (1988) 7 (3) *Commonwealth Judicial Journal* 9-14; J. Kurczewski and K. Frieski, 'The Social Conciliatory Commissions in Poland: A Case Study of Non-authoritative and Conciliatory Dispute Resolution as an Approach to Access to Justice' in M. Cappelletti and J. Wisner, (eds) *Access to Justice, Vol 2: Promising Institutions* (1978) (Milano, dott. A. Giuffre Editore.); H. P. Koo, 'Small Claims Process: The Singapore Experience' (October 1988) 7 *Civil Justice Quarterly* 329.

⁵ See e.g., H. Astor and C. Chinkin, *Alternative Dispute Resolution in Australia* (1992) (Sydney, Butterworths). See also discussion in Chapter 4 of this thesis for a detailed citation of literature on the ADR Movement.

and Tribunals remain at the cross-roads between formal and informal adjudication of disputes. Also, as explained in Chapter 2, we have much to learn regarding the interrelationship between such mechanisms as Small Claims systems and their more informal counterparts.

Rationale Underlying Small Claims Systems: The Search for Alternatives to Improve Access to Justice

There is no single nor universally agreed upon rationale for Small Claims Courts and Tribunals.⁶ Such diversity, is in one sense, inevitable as each society's approach to resolving issues about access to justice and dispute resolution must necessarily reflect the historical, political, social and economic context within which a particular dispute resolution system must operate.⁷ In another sense, however, it can be argued that this diversity also reflects the paucity of our theoretical understanding of the nature of law in society and the relationship between formal and informal dispute resolution mechanisms.⁸ Thus, Astor and Chinkin⁹ quite rightly point to the danger of comparing ADR with traditional adversary systems. They note that even in the traditional adversary system, the vast majority of cases are settled thus to compare ADR with adjudication can often be misleading.¹⁰ Secondly, recent research¹¹ about the nature of disputes suggests that some disputes are inherently unsuited to ADR and will inevitably lead to litigation; for such disputes the existence of ADR will make no difference. Thirdly, in highlighting the differences between ADR or Small Claims and traditional Courts it is easy to focus on differences and to ignore the interrelationships which exist between formal and informal systems.¹² Finally, it must be realised that often there are larger societal issues at play. The reality is that there are a limited number of resources which society can devote to formal Courts.

⁶ See I. Ramsay, *Debtors and Creditors: A Socio-Legal Perspective* (1986) (Abingdon: Professional Books).

⁷ See M. Cappelletti, *The Judicial Process in Comparative Perspective* (1989) (Oxford: Clarendon Press) 59.

⁸ See generally, R. Tomasic, *The Sociology of Law* (1985) (London, Sage) at 99-129.

⁹ Astor and Chinkin, *op. cit.* 29-30.

¹⁰ *Ibid.*

¹¹ See e.g., R. Williams, 'Should the State Provide ADR Services?' (1987) 6 *Civil Justice Quarterly* 142-52. Williams suggests there are three broad categories of disputes: A) those which will likely settle and constitute the vast majority of disputes; B) those which are more complex and have particular features which make it difficult to settle; and C) those disputes which are inevitably bound for trial. See also, Astor and Chinkin, *op. cit.* 27.

¹² See generally, C.A. McEwen and R. J. Maiman, 'Mediation in Small Claims Court: Achieving Compliance Through Consent' (1984) 18 *Law and Society Review* 11.

Historically, when the Courts have become too congested, it is the less powerful in society who are driven from the system and forced to seek alternatives as the highest Courts are generally reserved for cases involving the largest sums of money.¹³

Despite these conceptual difficulties, the obvious diversity of approaches adopted by countries in their treatment of small claims dispute resolution and the inherent difficulty in making generalisations from a comparison of systems which are significantly different from one another, a number of general factors or forces have been identified as having had a significant impact upon the judicial systems of most countries. Among these factors are: consumerism,¹⁴ the growth of the welfare state, demands for greater citizen participation, and the rise of the middle class.¹⁵ These forces, especially prominent in the decades from 1960s through the late 1970s, suggest the existence of general, widespread justifications for a special procedure to handle small claims. Moreover, such political and social forces have found expression in what Cappelletti has termed 'a responsive model' of the judicial system:

...the responsive model is an approach which reflects another parallel trend in the law of modern societies. this is the trend of seeing law and justice no longer within the framework of the traditional conception--the 'official' conceptions of the 'rules, governors, and other officials'--but rather in the framework of a more democratic conception, that of 'the consumers of law and government'.¹⁶

Cappelletti concludes that in both capitalist and socialist governments there are:

converging trends . . . clearly aimed at finding a correct balance between two apparently irreconcilable opposites, . . . namely: the citizen's right to have all his grievances heard by courts, and the speedy and efficient

¹³ R. Abel, 'The Contradictions of Informal Justice', in R. Abel (ed) *The Politics of Informal Justice* (New York, Academic Press) 267-319; Astor and Chinkin, *op. cit.* 29-30.

¹⁴ See generally, T.W. Church, 'A Consumer's Perspective on the Courts' (1990) Carlton South, Victoria, Australian Institute of Judicial Administration).

¹⁵ Cappelletti (1989), *op. cit.* 235-238.

¹⁶ *Ibid.* 113.

functioning of administrative bodies, whose task could be made difficult or impossible to accomplish were every decision subject to challenge in court.¹⁷

A full discussion of the forces of change¹⁸ which have led to the growth and development of Small Claims Courts and Tribunals are too numerous to mention and beyond the scope of this study. They include, for example, the growth in the number of motor vehicles in society which has generated much litigation which has created serious congestion in civil lists; the fact that with the declining influence of the church, family and neighbourhood, people have increasingly turned to Courts to remedy their personal wrongs;¹⁹ and a greater plurality of interests in society which has led various interest groups to resort to the legal system to protect their interests.²⁰ A major part of the justification of the search for alternatives such as Small Claims Courts is thus to be found in the failure of the traditional adversary system to adjust to the many changes which society demanded of it.

The Need for Inexpensive Justice

One major criticism of consumers and citizens regarding the effectiveness of the judicial system is that traditional Courts and lawyers²¹ are often seen to be too costly,²² especially in regard to the resolution of minor civil disputes.²³ As Roscoe Pound²⁴ observed almost a century ago:

¹⁷ *Ibid.* 231.

¹⁸ See Mr Justice Beaumont, 'Legal Change and the Courts' Plenary paper delivered to the 47th Annual ALTA Conference, Brisbane, 9-12 July, 1992.

¹⁹ *Ibid.*, citing Chief Justice Warren Burger of the US, (1982) 64 *American Bar Association Journal* 274-75.

²⁰ Mr Justice Beaumont, *ibid.*

²¹ See e.g., G. M. Roberson, 'Green Paper - Red Light?: An Antipodean Vista' (1990) (South Carlton, Australian Institute of Judicial Administration) 81 at 86 ('The question of access to justice [including the cost of justice] is one of the major issues confronting the legal profession today. The spiralling legal aid cost is of great concern to both Federal and State Governments and the fact that many of our potential clients cannot access our services should be a major worry to the private profession. A survey in New South Wales some time ago showed that over 300,000 people over eighteen had never consulted a lawyer. Many of those had not consulted a lawyer because of their fear of what it would cost them.').

²² See R. Usher, 'Falling Behind' (1989) *Time* 7 August 42 ('While barristers can charge up to \$A6000 a day for appearing in court for a client, many Australians find that seeking to right a wrong is a luxury they cannot afford, either in dollars or days'). See generally, M. Zander, *Legal Services for the Community* (1978) (London, Temple). See generally American Bar Association, 'Attacking Litigation Costs and Delay: Final Report of the Action Commission to Reduce Costs and Delay' (1984) (Chicago, ABA); British Columbia, 'Access to Justice: The Report of the Justice Reform Committee' (1988) (Victoria, BC, BC Provincial Government).

For ordinary causes our contentious system has great merit as a means of getting the truth. But it is a denial of justice in small causes to drive litigants to employ lawyers, and it is a shame to drive them to legal aid societies to get as a charity that what the state should give as a right.

The most significant part of the cost of adjudication is lawyer's fees. The fees for the top QCs can amount to several hundred dollars for pre-trial work and up to several thousands of dollars for the actual trial.²⁵ There have been many attempts in Australia and elsewhere to remove financial barriers to the legal system, most notably with the formal establishment of legal aid. However, today the present structure of Australian legal aid is itself seen by many²⁶ as in need of review.²⁷ For example, after a period of expanded funding the Commonwealth Government and State Governments are making budget cutbacks.²⁸ Also, governments are becoming increasingly aware of

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- 23 A. Scott, 'Small Causes and Poor Litigants' (1923) 9 *American Bar Assoc Journal* 458 ('But the machinery provided for the administration of justice is so ill-adapted to its purpose of small causes and causes in which one of the litigants suffers under the hardship of poverty that, in effect, it may be said that justice is denied'). In Australia, see the various submissions made regarding 'The Cost of Justice: An Inquiry by the Senate Standing Committee on Legal and Constitutional Affairs'.
- 24 R Pound, 'The Administration of Justice in the Modern City' (1913) 26 *Harvard L. R.* 302.; see also R. Pound, 'The Causes of Popular Dissatisfaction with the Administration of Justice' (1956) 8 *Baylor L. Rev* 1.
- 25 M. Fulton, *Commercial Alternative Dispute Resolution* (1989) (Sydney, Law Book Co) 87; see also Astor and Chinkin, *op. cit.* 31.
- 26 See e.g., The National Legal Aid Advisory Committee, *Funding, Providing and Supplying Legal Aid Services* (1989) (Canberra, AGPS); D. R. C. Chalmers and K. F. Mackie, 'Commonwealth of Australia and State of Tasmania: A Study of the Best Structure for Delivery of Legal Aid Services in Tasmania' (1989) (Hobart, University of Tasmania); Law Council of Australia, 'Legal Aid' Press Release 15/9/1988; Legal Aid Task Force, 'Final Report and Discussion Paper', (1985) (Canberra, Attorney General's Department, AGPS).
- 27 See Regan, F., 'Legal Aid for "the Poor" or "the Community"? A Comparative Study of Access to Legal Services in the USA, Sweden and Australia' (1990) (Bedford Park, School of Social Sciences, Flinders University). Regan concludes: 'The evidence about the legal aid scheme raises serious questions about how well it is working. We noted that services are not available equally to the poor across the country, that many poor and low income people have their court cases decided without any legal representation, and that there are many disadvantaged groups who still have inadequate access to legal services. The legal aid system is not providing effective access to legal services for the poor. Finally, the Commonwealth Government in particular is intent on cutting legal aid funding and will target aid only to those most in need - the 'worthy' poor' (at 74). See generally, National Legal Aid Advisory Committee, *Legal Aid for the Australian Community: Legal Aid Policy, Programs and Strategies* (July 1990) (Canberra, AGPS).

the plight of those earning too much to qualify for legal aid, but not enough to be able to afford legal representation.²⁹

In addition to the legal costs borne by the individual, the pressure on Governments to provide a the legal system of Courts and other dispute resolution procedures has also been intensified as State resources have remained static while demands on the system have grown alarmingly.³⁰

Justice Delayed is Justice Denied

Another frequent criticism of traditional Courts, especially in New South Wales,³¹ Victoria and Queensland, is the problem of delay.³² If justice is to be more than a theoretical possibility and if Courts are to be responsive to the needs of the citizenry, then it must be realised that 'justice delayed is justice denied.' Indeed, in a recent survey of Australia's top 200 companies, 93% cited delay as one of the worst features of the legal system.³³ This perception of the traditional legal system as intolerably slow is also shared by the general community.³⁴

Need for Simplified Procedures

A third major justification for Small Claims Courts and Tribunals emanates from the fact that traditional Court procedures are often viewed as unduly technical, tortuously prolonged and overly formal, especially in regard to small 'consumer-type' claims.³⁵ The legal rituals evidenced in formal judicial dress, uncomfortable Court layout, legal

28 Regan *op.cit.* 1-2.

29 *Ibid* 77.

30 Beaumont, *op. cit* 4.

31 *Ibid* (In NSW the number of appeals doubled between 1966 and 1991 despite the fact that the number of judges remained substantially the same).

32 Mr Justice R. E. McGarvie, 'Judicial Responsibility for the Operation of the Court System' (February 1989) 63 *ALJ* 79, 80 ('It is apparent that many courts today are unable to provide justice with dispatch and for a cost that makes it available to ordinary citizens.');

See also Astor and Chinkin, *op. cit.* 32-34.

33 M. J. Fulton, *Alternative Dispute Resolution in Commercial Disputes* (1989) (Sydney: Law Book Company) 73

34 See R. Tomasic, *Lawyers and the Community* (1978) (Sydney, George Allen & Unwin) 202.

35 A. Connor, and B. Doig, *A Research Based Evaluation of the Dundee Small Claims Experiment*, (1983) (Central Research Unit, Scottish Office).

jargon³⁶ and procedure which enshrine traditional Courts have often proven to be psychologically intimidating,³⁷ especially to the un-initiated.³⁸ Accordingly, many writers³⁹ have echoed the refrain of former Chief Justice of New South Wales, Sir Lawrence Street that 'We must be conscious of the need . . . to direct the future development of our judicial system towards simplification and rationalisation.'⁴⁰

Similarly, Auerbach⁴¹ has observed of the traditional trial:

Although a day in court is touted as the crowning achievement of the Anglo-Saxon legal system, it actually represents a massive breakdown of the system.

-
- ³⁶ Tomasic, *op. cit.* 208 ('Only people with formal legal training can understand legal matters properly'). Tomasic found that 66% of the people surveyed considered that the language of lawyers is hard to understand and almost 80% thought lawyers could simplify their language if they wanted to (at 209).
- ³⁷ See D. Coates and S. Penrod, 'Social Psychology and the Emergence of Disputes' (1980-81) 15 *Law & Society Review* No 3-4 655. See also, W. E. Burger, 'Isn't There a Better Way?' (1987) 68 *ABAJ* 274, 275 (Writing of the psychological costs of litigation, even if one wins); Mindful of the words of Shakespeare that 'many a truth is spoken in jest,' Waugh has depicted court room procedures as 'something between a Pontifical High Mass in the Tridentine Rite and a comic opera, see A. Waugh, *Sunday Telegraph* 23 September, 1984, cited in S. James and C. Steppings (eds) *A Dictionary of Legal Quotations* (1987) (London, Croom Helm).
- ³⁸ National Consumer Council, *Ordinary Justice: Legal Services and the Courts in England and Wales: A Consumer View* (1989) (London, Her Majesty's Stationery Office) 285 ('Even when people know that they can go to court, they are reluctant to use it. Consumers were asked what would worry them about going to court. Forty-five per cent mentioned the cost; a third said they would be worried about the whole atmosphere; a quarter mentioned the formalities; and a quarter mentioned the possible disappointment of losing. Twenty-seven per cent said they were worried about their name getting into the paper. For these people 'going to court' is seen as a personal disgrace').
- ³⁹ See e.g., R. Cranston, *Delays and Efficiency in Civil Litigation* (1985) (Melbourne, Australian Institute of Judicial Administration) ('Public and professional concern over delay in the courts has been long-standing in Australia. It and cost were the subject matter of a royal commission in Victoria at the turn of the century. Seventeen years ago, when the chief justice of New South Wales announced that judicial vacations would be deferred in an attempt to reduce congestion in the Supreme Court, *The Australian* 25 October, 1967, editorialised: "In Australia's two most populous States delays in court proceedings, with all their consequences of cost, frustration and personal suffering have reached a critical point so far as public confidence is concerned." In 1976 the Victorian Law Reform commissioner presented his report *Delays in Supreme Court Actions*. In recent times there has been media comment about delay in the Supreme Courts of the three jurisdictions examined by the project. For example, the chief justice of the Australian Capital Territory, Sir Richard Blackburn, has said that delay is the most serious criticism of the judicial process.' (at 3)).
- ⁴⁰ *In Resolution of Commercial Disputes* (1987) Vol 1, No 1, p. 4 (Melbourne, Australian Commercial Disputes Centre).
- ⁴¹ J. S. Auerbach, 'Welcome to Litigation. Why Lawsuits Are Such Fun' (1981) *The New Republic* 17 January, p. 19.

It means that every obstacle designed to deter judicial settlement has failed. The parties have overcome high costs, lengthy delays, tortuous procedures and endless negotiations, which encourage all but the most stubbornly contentious litigants to settle the dispute themselves, with the assistance of counsel. For months, if not years, they have wandered through the legal wilderness. Despite the hazards of persistence, they have emerged in precisely the wrong place: court.

Especially worrying are research findings which suggest that the formal adversary process may actually impede the ability of the Court to discover the truth.⁴² This is especially true of criminal proceedings in which procedural safeguards as the right to silence often leave the victim feeling that the system is unconcerned about them.⁴³ In civil cases too, many litigants are frustrated and even intimidated by formal rules which often impede the ability of witnesses to tell their side of the story.⁴⁴ Finally, there is the mere physical inconvenience attributed to antiquated Court buildings, inconvenient hearing times and other procedures which can intimidate the uninitiated and deter them from making use of the system.⁴⁵

Need for Legal Literacy

An additional problem with traditional Courts is that many people are unaware of their rights, even if there were an appropriate vehicle available by which the infringement of those rights might be addressed.⁴⁶ Thus access is denied or delayed because people do not realise or are late to realise that they have a legal problem.

42 Astor and Chinkin, *op. cit.* 35-36.

43 *Ibid* 35.

44 *Ibid.*; see generally, J. Conley and W. O'Barr, *Rules Versus Relationships* (1990) (Chicago, University of Chicago Press).

45 *Ibid* 36.

46 See R. Cranston, *Delays and Efficiency in Civil Litigation* (1985) (Melbourne, Australian Institute of Judicial Administration) 47-48; See also R. Cranston, *Legal Foundations of the Welfare State* (1985) (London, Weidenfeld & Nicholson) 58-62; National Consumer Council/Welsh Consumer Council, *Simple Justice: A Consumer View of Small Claims Procedures in England and Wales*, (1979); Office of Fair Trading, *Consumer Dissatisfaction: A Report on Surveys Undertaken by the Office of Fair Trading*, (February, 1986) (Less than 2% of those taking some form of further action threatened court action).

In summary, one major response of consumers and citizens to the high costs, protracted delays and legal formality and technicality so often associated with the traditional adversary system has been the search for 'alternative' methods of dispute resolution which are affordable, prompt and less intimidating. One of the most widely-used of these alternatives is the development of a special Court or Tribunal to handle Small Claims. The use of lawyers is usually barred or severely restricted; formal rules of evidence abandoned; and hearings often conducted in private.⁴⁷ By such measures, these Small Claims Courts and Tribunals aim to provide a forum for dispute resolution which is inexpensive, speedy and informal.

1.4 Development of Small Claims Procedures in Australia generally and specifically in Tasmania

As explained in detail in the next chapter, the genesis in Australia of a special procedure to handle small claims can be traced back to the turn of the century in England and the 1920s in the United States when similar reforms were being introduced to provide a quick and inexpensive way to resolve minor civil disputes. For example, influenced by similar reform in the English County Courts,⁴⁸ Tasmania instituted the Court of Requests primarily to achieve low cost, speed, and simplicity in handling disputes regarding small debts.⁴⁹ In subsequent years, however, forces of consumerism, worries about the costs and delay of formal Courts, and general concerns about access to justice led to the call for less adversarial mechanisms to handle an increasingly broad range of small claims.⁵⁰ As Mr Christopher Wright stated in the 1982 Tasmanian Law Reform Commission Report and Recommendations Relating to Consumer Claims and Small Debts: 'The need to provide persons with a forum in which disputes about small debts and claims in relation to consumer goods can be resolved simply, quickly and efficiently, with a minimum of expense and absence of traditional legal formality has been recognised for many years.'⁵¹ The

⁴⁷ The specific features of small claims courts and tribunals in particular jurisdictions are detailed in Chapter 2.

⁴⁸ *English County Court Act* 1846. See discussion in Chapter 2.

⁴⁹ *Local Courts Act* 1896 (Tas); See generally, Law Reform Commission of Tasmania, 'Jurisdiction and Procedures of The Court of Requests and Court of General Sessions' (23 January, 1984) (research paper by C.R. Wright), A. C. Castles, *An Australian Legal History*, (1982) (Sydney, Law Book Co).

⁵⁰ These developments are discussed in detail in Chapter 2.

⁵¹ Law Reform Commission of Tasmania, 'Report and Recommendations Relating to Consumer Claims and Small Debts', (1982) (Hobart, Tasmanian Government Printer) Report No. 28, at 5.

Tasmanian legislative response to these calls for reform came in August 1977 with the presentation of the Consumer Claims Tribunal Bill to the House of Assembly where it was passed and sent to the Legislative Council. There it was referred to a select committee with no further action taken. In April 1978 the Tasmanian Law Reform Commission produced a report on 'The Reform of Civil Procedure'⁵² which *inter alia* reviewed the jurisdiction of the 1977 proposal for a Consumer Claims Tribunal.⁵³

In 1980, the Law Reform Commission was asked to again consider the matter of how best to handle small consumer claims as well as the best means of handling claims for small debts. In addition, the Commission was asked to consider whether Small Claims system would best be established as Court or as Tribunal. The Law Reform Commission requested Mr Christopher Wright, then Solicitor-General, to investigate these issues and to provide a report after studying the Small Claims systems operating in other Australian States and in New Zealand. This Report⁵⁴ was presented to the Law Reform Commission on 30 November 1980⁵⁵ and made the following recommendations:.

- 1) The Court of Requests' overall jurisdiction should be increased to \$3000 in respect of both liquidated and unliquidated claims.
- 2) The Court of Requests should be retained essentially in its present form but the scale of fees payable should be simplified.
- 3) A special division of the Court of Requests should be established to be known as the "Consumer and Small Claims Division".

⁵² Tasmanian Law Reform Commission, 'The Reform of Civil Procedure' (1978) (Hobart, Tasmanian Government Printer) Report No 22.

⁵³ M. Pearsall, *Parliamentary Debates* (House of Assembly) (13 March, 1985) (No 2) 243-246.

⁵⁴ C. R. Wright, *Report on Small Claims Tribunal* (1980) (Hobart, Tasmanian Law Reform Commission).

⁵⁵ Pearsall, *op. cit.* 243.

4) The procedure of the new division should be similar to that provided in the Consumer Claims Tribunal Bill 1977 with such modification as have been recommended in Section 3 above.

5) The new division should have jurisdiction to conciliate and adjudicate in respect of

(i) Claims founded on contract or quasi-contract (including claims between landlord and tenant in respect of premises let for residential purposes;

(ii) Claims for a declaration that a person is not liable to another person in respect of a claim or demand founded on contract or quasi-contract made against him by that other person;

(iii) Claims in tort for damage to property resulting from the use of a motor vehicle where the amount in respect of which an order is sought does not exceed \$1500.

6) The new division should have jurisdiction to entertain claims for set off or counter claims not exceeding \$1500 in value in respect of any cause of action which a respondent alleges he has against a claimant.

7) ...If and when a defence is lodged where the claim falls between \$1 and \$1500, the claim should be transferred into the Consumer and Small Claims Division if an election to this effect is made by either or both of the parties. Undefended claims for debt or liquidated sums should continue to be dealt with under normal Court of Requests procedures.

In 1981, Mr Wright's Report was circulated for comment to judges, magistrates, lawyers, business associations, the Law Society, the Bar Association and other interested groups. The Law Reform Commission completed its final report in 1982, which was tabled in the House of Assembly on 22 June 1982.⁵⁶

Following its tabling, then Attorney-General, the Honourable Max Bingham, established a committee, comprising Members Mr Walker, Mr Davis and Mr Haros, Mr Davis and Mr Lyons, to consider the Wright Report. The Committee recommended the adoption of the 1982 Law Reform Commission Report which

⁵⁶ *Ibid.*

recommended the creation of a Small Claims Court as a division of the Court of Requests. As a Court, handling small claims in general, as opposed to a Tribunal specialising in consumer claims, the proposed jurisdiction of the Small Claims Court was considerably wider than that recommended in the 1977 proposal calling for a Small Claims Tribunal.⁵⁷

The Small Claims Division of the Court of Requests was established in 1985 with the passage of the *Court of Requests (Small Claims Division) Act 1985*⁵⁸. This Act was amended in 1987 to: 1) clarify the definition of 'small claim' in order to exclude mere debt recovery of a liquidated sum over which there is no dispute; 2) extend the Court's jurisdiction to include a claim in tort for damages in detinue or conversion; 3) give the Commissioner power to deal with contempt summarily; 4) allow the recovery of costs incurred up until a case had been transferred from the Court of Requests to the Small Claims Court; and 5) allow for regulations with regard to pre-hearing conferences.⁵⁹

These earlier Acts, however, were repealed by the *Magistrates Court (Small Claims Division) Act 1989* (Tas) which consolidated the Small Claims procedures into one Act and made both the Court of Requests and Small Claims Court sub-divisions of a new Magistrates Court. The new legislation also authorised the registrar or deputy registrar to conduct preliminary conferences.⁶⁰ In all other major respects, however, the Small Claims procedure continues to operate as before, except now Small Claims is a division of the Magistrates Court as opposed to the Court of Requests.⁶¹

⁵⁷ *Parliamentary Debates* (House of Assembly) (Mr Walker, MP (Denison)(13 March, 1985) (No 2) 246-247; Pearsall, *op. cit.* 244.

⁵⁸ *Court of Requests (Small Claims Division) Act 1985* (Tas).

⁵⁹ *Court of Requests (Small Claims Division) Amendment Act 1987*. See also, J. Bennett, Tasmanian House of Assembly, Fortieth Parliament - Second Session 1987, 'Second Reading, Court of Requests (Small Claims Division) Amendment Bill 1986, (Hansard) No. 3, 19 March 1987, 620-624.

⁶⁰ *Magistrates Court (Small Claims Division) Act 1989* (Tas), s 37.

⁶¹ Attorney General, Mr Bennett, explained the new legislation to the House of Assembly:

'In practice the Small Claims Division will continue to operate in the way in which it presently does. The major provisions of the Small Claims Division legislation are simply transferred to the new bill. The only changes are those relating to the name 'the Magistrates Court', rather than the Court of Requests, those consequent on the appointment of the special commissioner as a magistrate, and those reflecting minor clarifications of procedure. The Government believes that the Small Claims Division has been an outstanding success and has no intention to substantially revise its operating procedures.' *Magistrates Court (Small Claims*

1.5 Questions Investigated

As indicated above, the major question investigated by this study involves an appraisal of how the Small Claims Court is working and how it might be improved. Among the more specific issues which are addressed by this study are:

- What are the characteristics of the users of the Small Claims Court?
- What are the characteristics of the types of claims which come before the Small Claims Court?
- Are disputants satisfied with the Small Claims Court? Is it informal enough, private enough? How do disputants feel about the restrictions on lawyers?
- How convenient for the users is the Court?
- Is there any problem with Court delay or costs?
- How do supporting networks, such as Community Advice Centres and Consumer Affairs view the success of the Small Claims Court?
- To what extent does the Court fulfil its role in helping the parties settle their dispute?
- Is the Small Claims Court adequately publicised? How do people find out about it?
- How much assistance should be given to disputants?
- Is there a problem with the collection and enforcement of judgments?
- Should the jurisdictional limit of \$2000 be maintained?
- Should collection agencies be allowed to utilise the Small Claims Court?

- Is any particular group abusing the Small Claims Court System?

Having established the purpose and scope of this thesis, the next chapter surveys the literature concerning Small Claims Courts and Tribunals.

Chapter 2

SMALL CLAIMS COURTS AND TRIBUNALS IN OTHER COUNTRIES

2.1 Introduction

A frequent criticism of many evaluations of public programs is that they are ahistorical; they present a picture of a Small Claims Court, school or other program as if it existed out of time, and with no past or ongoing development. This and the two succeeding chapters represent an attempt to place the Tasmanian Small Claims Court within a wider context in order to make the point that many features inherent in Tasmanian Small Claims Court were influenced by, and can only be understood within the wider context of, similar developments in other Common Law Countries and Australia generally. Thus, this chapter presents a brief description of the Small Claims systems adopted in selected countries together with a discussion of the major evaluative research analysing the effectiveness of these systems. Chapter 3 then turns to the development of Small Claims systems in Australia generally and the Tasmanian system in particular. Finally, Chapter 4 presents a synthesis in the form of various themes emerging from the literature on Small Claims Courts and Tribunals. These themes have helped to shape and guide the methodology employed in the present evaluation of the Tasmanian Small Claims Court.

2.2 Historical and Comparative Development and Growth of Special Procedures to Handle Small Claims

While the 'access to justice movement' reached its peak in the 1960s and 70s, the idea of a specialist Tribunal or Court to handle small claims developed much earlier. For example, forerunners of Small Claims systems are found in the legislative reforms of the County Courts in England and Wales.¹ This legislation, passed in 1846, emphasised a simplified procedure and the use of Small Claims processes by litigants themselves and without resorting to legal assistance.² The major purpose of these

¹ See P. Nejelski, 'The Small Claims and Access to Justice Dispute Resolution: Trends and Issues,' (1982) 20 *Alberta Law Review* 314. See generally, C. J. Whelan (ed), *Small Claims Courts: A Comparative Study* (1990) (Oxford: Clarendon Press).

² 9 and 10 Vict, c.95 - an Act for the More Easy Recovery of Small Debts and Demands in England. See generally, W. H. Holdsworth, *A History of English Law*, Vol 1 1903) (London, Methuen) 191.

reforms was to enable citizens 'to obtain that most desirable object, cheap justice, in the speediest manner, in a cause of a moderate amount.'³ In the United States, a Small Claims Court designed to eliminate the expense and delay of traditional Courts and to be accessible to the poor was first established in 1912 in the state of Kansas.⁴

Not only is concern about dispute resolution in small claims not new, but the diverse historical, social, political and economic contexts in which Small Claims Courts and Tribunals operate has meant that there is considerable variety in the features of particular Small Claims systems.⁵ Some jurisdictions have modified existing Court procedures or established a special Court division to handle small claims. Other jurisdictions have created special Small Claims Tribunals independent of the formal Court system. Finally, in some jurisdictions there is no perceived need for a separate system to handle small claims.⁶

As a result of the justifications discussed above, Small Claims Courts and Tribunals, in various forms, have been established in many countries⁷ and every Australian jurisdiction.⁸ These developments reflect the need for special adjudicating structures and procedures which can be adapted to the needs of the citizenry, while 'continuing to assure the quality of justice rendered by such bodies.'⁹ More specifically, Ruhnka and Weller¹⁰ as well as the National Consumer Council¹¹ in the UK have identified

³ Lord Brougham, H. C. Deb., xxiv, col. 262.

⁴ Robert J. Fowks, 'Small Claims Courts: Simplified Pleadings and Procedures', (1968) *Journal of Kansas Bar Association* (Fall) 167-172. See also C. L. Edholm, 'The Small Debtors' Court' (1915) 22 *Case and Comment* 29.

⁵ See Whelan, *op. cit.* 208-212.

⁶ *Ibid.*

⁷ See generally, Whelan, *ibid.*

⁸ *Small Claims Tribunals Act 1973* (Qld); *Small Claims Tribunals Act 1973* (Vic); *Small Claims Tribunals Act 1974* (W.A.); *Local and District Criminal Courts Act 1926* (S.A) Part VIIA (sec. 152a-152g); *Small Claims Ordinance 1974* (A.C.T.); *Small Claims Act 1974* (N.T.); *Consumer Claims Tribunals Act 1987* (N.S.W.); *Magistrates Court (Small Claims Division) Act 1989* (Tas).

⁹ M. Cappelletti, *The Judicial Process in Comparative Perspective* (1989) (Oxford: Clarendon Press) 243.

¹⁰ J. C. Ruhnka and S. Weller, *Small Claims Courts: A National Examination* (1978) (Williamsburgh, Va., National Center for State Courts) 2,3.

¹¹ National Consumer Council, *Ordinary Justice: Legal Services and the Courts in England and Wales: A Consumer View*. (1989) (London, Her Majesty's Stationery Office) 286 ('In our view it [the Small Claims procedure] should provide a system which is:

six important goals of Small Claims Courts and Tribunals: speed, low cost, simplicity, self-representation, fairness, and effectiveness. These goals provide a useful set of criteria upon which to measure the effectiveness of any particular Small Claims system.

2.3 Research from other Countries: Basis for Selection

In contrast to Australia where Small Claims Courts and Tribunals are a recent and largely unstudied phenomenon, the County Courts in the UK and Small Claims Courts or Tribunals in the United States and elsewhere¹² have been the subject of much research. Accordingly, it is useful to examine this body of work in order to place the Tasmanian experience in a proper context and to discern what lessons may be learnt from others' attempts to provide a system of justice which is both accessible and responsive to citizens, even though their dispute be comparatively small.

As mentioned in the introduction, the development of Small Claims Courts and Tribunals has been heralded as part of a world-wide access to justice movement. Thus, it is important to stress that by considering Small Claims developments in a number of specified countries, this is not to suggest that developments have not occurred elsewhere. Indeed, Whelan's excellent collection of comparative studies presents portraits of additional Small Claims systems in many countries, including W. Germany¹³, Japan¹⁴, and Northern Ireland¹⁵. The comparative basis in this chapter, however, is more narrow than Whelan's and focuses on the development of special Small Claims procedures in England, Wales, Canada, New Zealand and the United States. This eclectic choice of countries was made on the basis of the common law origin shared by the countries selected, as well as their perceived relevance to a fuller understanding of the Tasmanian system, the evaluation of which is the purpose of this

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- accessible - both geographically and in the image it presents to the public;
 - simple to use and understand;
 - informal enough to allow individuals to present their own case;
 - cheap - both for the user and the state;
 - quick and effective in the settlement of disputes;
 - just

¹² See references to Small Claims studies in various countries, Chapter 1, note 4

¹³ K. Rohl, 'Small Claims in Civil Court Proceedings in the Federal Republic of Germany' In Whelan, *op. cit.* 167.

¹⁴ T. Kojima, 'Small Claims from a Japanese Perspective', in Whelan, *op. cit.* 183.

¹⁵ D. Greer, 'Small Claims in Northern Ireland', in Whelan, *op. cit.* 133.

study. Indeed, as will be pointed out in Chapter 3, when the Tasmanian system was developed in 1985, policy makers in the Tasmanian Government and the Tasmanian Law Reform Commission were well aware of similar developments in these other common law jurisdictions.

2.4 Development of Small Claims Systems in England and Wales

2.4.1 Description of the System for Handling Small Claims

While a precursor to a Small Claims Court or Tribunal existed in the form of legislative reform of the County Courts,¹⁶ the modern Small Claims 'movement' in England and Wales is just over 25 years old.¹⁷

In 1970, the now defunct Consumer Council surveyed and interviewed solicitors and consumers and analysed records in six County Courts.¹⁸ It was found that neither Courts nor solicitors were being utilised by individual consumers to settle consumer disputes. These findings led to procedural reform in the County Courts and to the establishment of an independent Small Claims Court in Manchester.¹⁹

The reform of County Courts so that they would be more conducive to handling small claims was brought about in stages. The first step in reforming the County Courts in England and Wales was the establishment, as of 1 March 1972, of a system of pre-trial review.²⁰ A major backdrop to these reforms was the Consumer Council Study of 1970, *Justice Out of Reach*,²¹ which advocated the adoption of an arbitration procedure in each of the County Courts by which Registrars would be empowered to

¹⁶ County Courts Act 1896, 9 and 10 Vict., C.95 - An Act for the More Easy Recovery of Small Debts and Demands in England; Note that in some parts of England, existing local courts were brought into the national scheme of County Courts.

¹⁷ C. J. Whelan, 'Small Claims in England and Wales: Re-defining Justice' in Whelan, *op. cit.* 99, 102-106.

¹⁸ Consumer Council (U.K.), 'Justice Out of Reach, A Case for Small Claims Courts' (1970) Consumer Council Study (UK) July, 1970.

¹⁹ Whelan (1990), *op. cit.* 99.

²⁰ G. Applebey, 'Small claims in England and Wales: A Study of Recent Changes in the County Courts and the Development of Voluntary Arbitration Schemes (1979) (Birmingham, University of Birmingham) 1.

²¹ Consumer Council, *Justice Out of Reach* (1970) (London, HMSO).

administer informal procedures which parties could utilise without the aid of solicitors. This Report was followed by the extension of arbitration to Small Claims in October 1973.²² It is important to note the key role of the Registrar within the County Court system. The Registrar must be a solicitor of at least seven years standing and is appointed by the Lord Chancellor. He or she has both an administrative and judicial function which includes the maintenance of Court records, arranging the issue and service of summonses, and accounting for all moneys paid into Court. The Registrars also arrange all pre-trial reviews and conduct arbitrations.²³

Pre-trial reviews are used in contested cases only. If a person wishes to bring an action in County Court a 'request for summons' form is completed for either a Default Summons or an Ordinary Summons. The 'Default Summons' is used to recover a debt or a specific sum of money, such as the price of goods sold. While all other claims require an Ordinary Summons.²⁴ In a default action:

...no date is fixed for the parties to attend the court, but if the defendant does not pay the amount of the claim or deliver an admission or defence or a counterclaim within fourteen days after service of the summons upon (them), the plaintiff is entitled to have judgment entered. To enter judgment, the plaintiff has to complete a form requesting entry of judgment. This can be done by post, and in such cases there will be no pre-trial review. Judgment is obtained by default in this way in over 75 per cent of all cases commenced in the county courts. If the defendant admits the claim, but asks for time to pay or for payment to be by instalments, and if the plaintiff does not accept, the Registrar will fix an appointment to decide how the debt is to be paid. These are called 'disposals' and are informal though not to be confused with pre-trial reviews. . .²⁵

²² Applebey (1979) *op. cit.*; See generally, J. N. Turner, 'Small Claims Tribunals: A Challenge to the County Court: A Preliminary Report' (1973) (Birmingham, University of Birmingham).

²³ G. Applebey, 'Small Claims in England and Wales' (1979), in M. Cappelletti and J. Weisner (eds) *Access to Justice* (Alphenasndenrijn, Sijthoff and Noordhoff) at 683-763.

²⁴ *Ibid* 695.

²⁵ *Ibid* 696.

Pre-trial reviews are employed for Ordinary summonses unless the Registrar directs otherwise. The purpose of the review is to bring the parties together before the Registrar to discuss the evidence and issues. This pre-trial review enables the Court to consider the merits of the case at an early stage and to secure the just, expeditious and economic disposal of the action. This is in stark contrast to the party-control features of traditional adversarial procedures. Legal representation is allowed at the reviews, though this is usually conducted by articulated clerks or legal 'executives'. Applebey found that approximately 50% of plaintiffs and 40% of defendants were represented.²⁶

Applebey also found that a high percentage of litigants, especially defendants, did not attend the voluntary or discretionary review. If the defendant does not attend, the Registrar may enter judgment for the plaintiff.²⁷ If the plaintiff does not attend, the action may be struck out. However a party may make an application to restore the case for hearing on another day.

Applebey's overall evaluation of the review process was that the efficiency of the Court had improved by enabling the Court to better sort out which cases should go to trial and ensuring that parties were better prepared for the hearing.²⁸

A second major procedural reform in the County Court Small Claims procedure was that no legal costs, except those fixed on the summons, were recoverable for summonses less than £20. The major aim of this reform was to discourage the use of solicitors for small claims.²⁹ In October 1973 the figure was raised to £75.³⁰

A third major procedural reform in the County Courts related to arbitration. In contrast to previous rules where both parties had to consent to arbitration, County Court Registrars were given the power, in cases up to a specified monetary limit, to refer a matter to arbitration at the request of either party, with or without the other party's consent.³¹ Special features of the arbitration hearing included the absence of

²⁶ *Ibid* 703.

²⁷ *Ibid*. Note no conclusive figures were available.

²⁸ *Ibid* 698.

²⁹ Applebey (1979), *op. cit.*

³⁰ Whelan (1990), *op. cit.* 100.

³¹ *Administration of Justice Act* 1973 (UK), s 7.

formal rules of evidence, informal and private hearing, and the ability of the Registrar to consult an expert or call for an expert report.³² Later amendments have seen the arbitration procedure applied to a wider range of disputes and to those involving greater amounts.³³ Also, the arbitration procedure can now be utilised automatically once a defence is filed. There is no need for one of the parties to request it.³⁴ The arbitration award is final and binding, though a party can ask for it to be set aside, if for example the party can provide a reasonable excuse for his/her non attendance.³⁵

These represent the major changes in the County Court Small Claims procedures, though further reform is expected at the completion of the Civil Justice Review which is now in progress.

There have also been attempts to establish financially independent Small Claims Courts. The most significant of these was in Manchester and sponsored by the Nuffield Foundation and the Greater Manchester Council.³⁶ The Court was run by a management committee nominated by the law society, Citizens' Advice Bureaux and the local community. Jurisdiction was limited to 'consumer claims' and later to some tort actions. The amount in controversy could not exceed £500. Both parties had to agree to the Court's jurisdiction. Arbitrators, consisting of solicitors and some experts, were part-time and paid a small fee. There was some experimentation with a bench of experts and solicitors, but it was considered costly and time consuming. Professional representation was prohibited and hearings were held in private, usually in the evening. A major emphasis was placed on conciliation prior to arbitration. No appeal was allowed. The Westminster independent Small Claims Court was established by the City of Westminster Law Society and operated from 1973 through 1979. The Court was housed in the Polytechnic of Central London. Noted features of this Court were a management committee, flexible hearing times, absence of professional representation and an inquisitorial approach. As in the Manchester Court, both parties had to agree to utilise its procedures. In its first five years of operation, companies, partnerships and assignees of debts were prohibited from

³² *Whelan. op. cit.* 101.

³³ As of 1981 the arbitration procedure applies to most disputed claims under £500 and can be invoked for claims up to £5000 if the parties agree. County Court (Amendment No. 3) Rules, s. 1, 1980/1807; Order 19, County Court Rules 1981, cited in *Whelan ibid.* 101-102.

³⁴ *Whelan, op. cit.* 101.

³⁵ *Applebey, op. cit.* 702.

³⁶ *Ibid* 2.

bringing cases. This rule was however amended in its sixth year to allow such claimants to utilise the Court, but only for disputed cases. Costs were also limited in practice to the Court fee paid by the losing party. Finally, the Lewisham Small Claims Court was also established in London but was both short lived and poorly utilised.³⁷

In summary, small claims disputes in England and Wales have, for the most part, been placed into a common law adversarial system adapted only slightly from the system adopted in the disputed common law cases.

2.4.2 Small Claims Research in England and Wales

The first study conducted in recent times was by Varano³⁸ who interviewed a number of Registrars following the introduction of the Small Claims procedure. Varano formed the impression that the new procedures had not opened up the doors to justice to the poor. Moreover, the Registrars generally favoured the existence of legal representation and were reluctant to see parties handle their own disputes.³⁹

Applebey, referred to above, published his study, *Small Claims in England and Wales* in 1978.⁴⁰ He found that the new reforms were generally more successful for those parties who employed solicitors. However, for the average person, handling their own case, the system remained too lengthy, complex and confusing. Accordingly, Applebey recommended greater simplification and accessibility and the creation of a Small Claims division of the County Court.⁴¹

In 1979, the National and Welsh Consumer Councils⁴² conducted parallel studies in an effort to determine the best ways to handle small consumer claims. They sought also to assess the extent to which consumers failed to take cases to the Courts and

³⁷ See Whelan, *op. cit.* 119-124.

³⁸ Cited in Whelan, *ibid* 106.

³⁹ *Ibid.*

⁴⁰ G. Applebey, *Small Claims in England and Wales* (1978) (Birmingham, Institute of Judicial Administration). Reprinted in M. Cappelletti and B. Garth (eds) *Access to Justice: A World Survey* (1978a) (Alphenaaandenriijn, Sijthoff and Noordhoof).

⁴¹ Cited in Whelan, *op. cit.* 107.

⁴² National Consumer Council/Welsh Consumer Council, *Simple Justice: A Consumer View of Small Claims Procedures in England and Wales* (1979) (London, Her Majesty's Stationery Office) See Whelan, *op. cit.* 107-109.

their reasons for not doing so, as well as the perceived effectiveness of Courts when they were used as a means of redress. Their methodology involved the survey of consumers and advice agencies. Interviews were conducted of 491 consumers who were presented with hypothetical problems and asked how they would try to settle them. The majority of chief trading standards officers, responsible for enforcing consumer protection laws, also responded to a postal survey as did most of a sample of 55 Citizens' Advice Bureaux. Further information was received from eleven consumer 'advice centres' and 248 consumers with experience in Small Claims who replied to publicised invitations. These studies found that consumers generally knew very little about the law or legal means of redress for small claims. Even when they went to Court, they were often very confused about the procedures involved, for example the difference between the pre-trial review and arbitration. There was also considerable variation among Courts, the major determinant being the attitude toward Small Claims of Registrars and other Court officials.⁴³

Among the recommendations of the Councils were: 1) key points of procedure (e.g. pre-trial review and arbitration) should be standardised; 2) a debt enforcement office should be established; 3) more training schemes relevant for new staff and Registrars handling small claims should be introduced; 3) provisions for expert testing should be employed; 4) the no-costs rule be simplified; and 5) arbitration should be made compulsory for most cases. The Councils' main recommendation, that a separate Small Claims division be established within the County Court system, failed to be adopted.⁴⁴

Further insights into the attitudinal problems of Registrars and Court officials towards small claim procedures was ascertained by O'Grady⁴⁵ in 1981. He interviewed a number of leading Registrars and County Court clerks. Registrars complained about inexperienced and unrepresented litigants raising quite complex legal questions. These parties, Registrars argued, must, in order to feel they have had their say, be allowed to ramble on, thus making it impossible to schedule the Court's time. Also cited by the Registrars were the unsuitability of small claims for complex and test cases; dangers in prohibiting legal representation and limiting the right of appeal;

43 *Ibid.*

44 *Ibid.*

45 F. J. O'Grady, 'Report to the Law Foundation of N.S.W. and Department of Attorney General and Justice on Examination by F. J. O'Grady of Certain Civil Claims Alternate Resolution Systems in England and the United States of America', unpublished paper, Law Foundation of New South Wales (1981). Cited in Whelan, *op. cit.* 108-111.

problems in finding sufficient judicial officers, sufficient physical space; and the need to maintain the quality of justice. The county Court clerks did not like to deal with individuals, accustomed as they were to dealing with solicitors. It was also felt that the information booklet given to litigants was too long. Even so it contained insufficient information, thus requiring clerk's to give informal oral advice on procedures. Thus, Court officials were far from comfortable with the objectives of small claims.⁴⁶

More recently, the Lord Chancellor's Department, as part of its Civil Justice Review, in 1986 commissioned Touche Ross to conduct a study of the Small Claims procedure in County Courts.⁴⁷ A sample of 876 defended cases under £500 and which had been set down for hearing were analysed. Interviews were also conducted of 29 Registrars, 408 litigants and 50 'potential litigants'. Unfortunately, as noted by Whelan,⁴⁸ the study was flawed by its failure to consider undefended small claims and defended small claims which had not been set down for arbitration.⁴⁹ Also the study failed to distinguish private, individual litigants from business litigants. Touche Ross also erroneously concluded that any judgment for the plaintiff was a favourable outcome. Ignored was the percentage which the judgment bore to the amount of the claim.⁵⁰

Despite these methodological shortcomings, Touche Ross found that two thirds of the Registrars would hold preliminary hearings in all cases, though a third stated they would try to avoid a preliminary hearing if possible. Almost all the Registrars felt the need for more expert evidence and few allowed non-legal representation. It was also found that two thirds of the plaintiffs first heard of Small Claims through an intermediary, the most common source of help being solicitors. Just over half the plaintiffs stated this was not their first experience in using the Courts to pursue a claim, and 36% had used Small Claims before. 31% of the plaintiffs had not seen the

⁴⁶ *Ibid.*

⁴⁷ Touche Ross, *Civil Justice Review: Study of the Small Claims Procedure* (1986) (London, Touche Ross).

⁴⁸ Whelan, *op. cit.* 111-118.

⁴⁹ C. J. Whelan, 'The Role of Research in Civil Justice Reform: Small claims in the County Court' (1987) 7 *Civil Justice Quarterly* 237.

⁵⁰ *Ibid.*

Court's information booklet, *How to Sue in the County Court*. Of those that did, 80% found it either very useful or quite useful.⁵¹

A later study by Bowles⁵² in the same year attempted to answer some of the questions unanswered by the Touche Ross study. He selected a random sample of 134 cases, of which 100 involved small claims under £500 drawn from the approximately 5000 cases brought through a particular County Court office during 1984. Bowles found that private individuals are defendants in 59 per cent of all cases, but only account for 14% of all cases defended. In contrast, firms, traders and companies are defendants in 41% of all claims filed but accounted for 86% of the cases where a defence was filed. He also found that when private individuals do bring a claim, they will more often find it being defended. Regarding legal representation, Bowles found that individuals were less likely to employ a solicitor to file a claim on their behalf, but as defendants individuals were most likely to find a solicitor filing a claim against them. Interestingly, the research also showed that 85% of defended small claims did not proceed to an arbitration hearing, thus suggesting that the Touche Ross sample, based upon defended cases set down for arbitration was biased. Also because private individuals tend to drop out of a case faster than do businesses, the Touche Ross data on individuals was also biased.⁵³

In 1988 the Welsh Consumer Council published *Courting the Consumer: A Study of Access to the County Courts in Wales*.⁵⁴ A sample of 8 of the 36 County Courts in Wales was involved and included a interviews with 53 Court users, as well as interviews with solicitors, Court staff and other professionals, a postal survey of Court clerks, and a physical survey of Court buildings. Among the key recommendations emanating from the Council's study were:

- 1) Improved physical access by clearer signposts in both Welsh and English; availability of reception offices wherever possible to deal with initial enquiries; the provision of more pleasant waiting areas and of greater amenities,

⁵¹ Touche Ross, in Whelan, *op. cit.* 112-118.

⁵² R. A. Bowles, 'The County Court Small Claims Procedure: Preliminary Findings from a Small Survey', unpublished manuscript, School of Humanities, University of Bath, cited in C. J. Whelan, *op. cit.* 118-119.

⁵³ *Ibid.*

⁵⁴ Welsh Consumer Council, *Courting the Consumer: A Study of Access to the County Courts in Wales* (1988).

especially for the disabled; and staff training to improve awareness of user needs;

- 2) Better and more access to information and advice by the provision of a full range of up-to-date literature, clearly displayed and freely available; posters which highlight the availability of legal aid, interpreter services, counselling services, etc; the use of forms which are comprehensible and non-intimidating.
- 3) Improved Court procedures by simplification of existing rules, the use of a good standard form to eliminate the preliminary hearing wherever possible so that one hearing becomes the norm; more active Court involvement in case administration; and the establishment of a debt welfare service to assess the defendant's ability to pay and thereby prevent wasting Court and plaintiff time.
- 4) Regular monitoring of the language needs of Court users.
- 5) The establishment of local advisory committees as a means of liaison with representatives of consumer agencies, local law societies, solicitors, Court staff and the judiciary.⁵⁵

Finally, mention must be made of the Review Body on Civil Justice which has made a number of recommendations regarding Small Claims procedure.⁵⁶ These include: raising the jurisdictional limit to £1000; a more inquisitorial approach by the judiciary in cases where one or both of the parties is unrepresented; more lay representation; simplified forms and information; increased assistance of litigants by Court staff; and closer links between Courts and advice agencies; improved Court facilities and amenities; special training for Court staff; and carefully monitored experiments involving for example, evening hearings and use of paper adjudication in particular cases.⁵⁷

⁵⁵ *Ibid.*

⁵⁶ Civil Justice Review, *Report of the Review Body on Civil Justice* (1988) (London, HMSO, Cm. 394). See also *Courts and Legal Services Act* 1990 (UK).

⁵⁷ *Ibid.*

2.5 Small Claims Systems in the United States

2.5.1 Description of Small Claims Systems

As mentioned above, the United States Small Claims experience began in 1912 as a response to criticisms of an adversarial system which had become to expensive, slow and formal to handle small disputes, especially for claimants who could not readily afford legal representation. Weller, Ruhnka and Martin⁵⁸ suggest that:

[A]s an inexpensive means of debt collection, the small claims court model initially adopted in the United States included five major components. First, court costs were minimized. Secondly, pleadings were greatly simplified. Thirdly, trial procedure was largely left up to the discretion of the trial judges, and formal rules of evidence were eliminated. Fourthly, judges and court clerks were expected to assist litigants both in trial preparation and at trial so that representation by attorneys would be largely unnecessary. And fifthly, judges were given the power to direct instalment payment of judgments.⁵⁹

Gradually, a majority of states⁶⁰ adopted some type of Small Claims procedure, though there remains a wide variety of models. For this reason, and the fact

⁵⁸ S. Weller, J. C. Ruhnka and J. A. Martin, 'American Small Claim Courts' in C. J. Whelan (1990), *op. cit.* 3-23; See also, S. Weller, J. C. Ruhnka and J. A. Martin, 'In-Court Assistance to Small Claims Litigants' (1983) 7 *Civil Justice Quarterly* 62.

⁵⁹ Weller, Ruhnka and Martin, in Whelan, *op. cit.* 5.

⁶⁰ See *Alaska Stat* s 22.14.040 (1988); *Ariz. rev. Stat. Ann.* s 22-501 (Supp. 1988); *Ark. Stat. Ann.* s 16-17-601 (1987 & Supp 1987); *Cal. Civ. Proc. Code* s 116 (Deering 1972 & Supp. 1989); *Colo Rev. Stat* s 13-6-401 (1987 & Supp 1988); *Conn. Gen. Stat* s 52-549a (Supp 1987); *D. C. Code Ann* s 16-3901 (1981 Supp & Supp. 1988); *Haw. Rev Stat* s 633-28(1985); *Idaho Code* s 1-2301 (1979 & Supp. 1988); *Ill. Rev. Stat.* ch 110A, para. 281 (1987); *Ind. Code* s 33-11.6 (1988); *Iowa Code* s 631 (1989); *Kan. Stat. Ann.* s 61-2701 (1983 & Supp 1987); *Ky Rev. Stat. Ann* s 24A.200 (*Michi/Bobbs-Merrill* 1985 & Supp. 1988); *La. Rev. Stat. Ann* s 13.5200 (West Supp 1989); *Me. Rev. Stat.* 14 s 7481 (Supp. 1988); *Mass. Gen. L.* ch. 218, & s 21 (1986); *Mich. Comp. Laws* s 27A.8401 (1986); *Minn. Stat.* 487.30 (1988); *Mo Rev. Stat.* s 482.300 (1986 & Supp. 1988); *Mont. Code Ann.* s 25-34-101 (1987); *Neb. Rev. Stat.* s 24-521 (1985 & Supp); *Nev. Rev. Stat.* s 73-010 (1987); *N.H. Rev. Stat. Ann* s 503 (1983 & Supp 1988); *N. J. Stat. Ann.* s 2A:6-41 (West 1987); *N.M. Stat. Ann.* s 34-8A-1 (1981 & Supp 1988); *N.Y. City Civ. Ct. Act* s 1801 (McKinney 1987 & Supp. 1988); *NY Uniform Dist. Ct Act* s 1801

that United States procedures are often quite different to those of Tasmania, many studies of American Courts are of limited comparative value. However, the U.S. experience is useful from a historical perspective and as an aid to understanding the rationale behind particular Court features. For example, the reason why Tasmania does not allow the Small Claims Court to be utilised for the mere collection of debts is because Tasmanian law reform bodies were aware of US studies, discussed below, which showed that when this occurred the Court tended to be dominated by plaintiff debt-collectors.

2.5.2 Research on United States Small Claims Systems

Following the criticisms directed against Courts by Pound and other influential scholars, the early decades of the twentieth century saw a significant number of U.S. States develop Small Claims Courts or special procedures for handling Small Claims.⁶¹ Zeal for reform of Small Claims procedures, however, dwindled rapidly in the middle decades when the Courts 'went largely unnoticed and uncriticised'.⁶² Since the 1960s and 1970s Small Claims Courts and Tribunals have received 'widespread attention from lawyers, social scientists and the concerned public'.⁶³

(McKinney 1987 & Supp 1988); *N.C. Gen. Stat* s 7A-210 (1986 & Supp 1988); *N.D. Cent. Code* s 27-08.1 (1974 & Supp 1987); *Ohio Rev. Code Ann* s 1925 (Baldwin 1987); *Okla. Stat. tit. 12*, s 1751 (1981 & Supp. 1988); *Or. Rev. Stat.* s 46.405 (1953 & Supp. 1988); 42 *Pa. Cons. Stat. Ann.* s 1123 (Purdon 1981 & Supp 1988); *R.I. Gen Laws* s 10-16-1 (1985 & Supp. 1987); *S. D. Codified Laws Ann.* s 15-39-45 (1984 & Supp 1988); *Tex. Rev. Civ. Stat. Ann.* art 2460a (Vernon 1971 & Supp. 1988), repealed by Act of June 15, 1985, ch 480, s 26(1) 1985 *Tex. Gen. Laws* 1720, 2048 (effective September 1, 1985); *Utah Code Ann.* s 78-6-1 (1987 & 1988 Supp); *Va. Code Ann* s 16.1-22.1 (1988); *Vt Stat. Ann. tit. 12*, s 5531 (1973 & Supp 1988); *Wash. Rev. Code* s 12.40.010 (1987 & Supp 1988); *Wis. Stat.* s 799.01 (1985-86); *Wyo. Stat* s 1-21-201 (1988);

- 61 For an excellent historical discussion of the United States small claims experience, see E. Steele, 'The Historical Context of Small Claims Courts, (1981) *Am. B. Found. Res. J.* 293.
- 62 S. Elwell and C. D. Carlson, 'The Iowa Small Claims Court: An Empirical Analysis' (1990) 75(2) *Iowa Law Review* 433, 440.
- 63 B. Yngvesson and P. Hennessey, 'Small Claims, Complex Disputes: A Review of Small Claims Literature', (1975) 9 *Law and Society Review* 219, 220; D. Gould, Staff Studies No. 3 Prepared for the National Institute of Consumer Justice 6-7 (1972); J. Ruhnka and S. Weller (1978), *op. cit.* 22; Small Claims Court Study Group, National Institute for Consumer Justice, *Little Injustices: Small Claims Courts and the American Consumer* (1972); A. Alexander, 'Small claims Courts in Montana: A Statistical Study, (1983) 44 *Mont L. Rev.* 227; F. Forbes, 'The Nebraska Small Claims Court Experience: A Comprehensive Examination of Attitudes, Practices and Suggestions for Improvement,' (1984-85) 19 *Creighton Law Review* 675; J. G. Frierson, 'Let's Abolish Small Claims Courts' (Fall 1977) 16 *Judges Journal* 18; Graham & Snortum, 'Small Claims Court: Where the Little Man Has His Day'

In a seminal article, Yngvesson and Hennessey⁶⁴ summarised US Small Claims Court research up through the mid 1970s. They pointed out that early Small Claims research in the 1950s, 60s and early 70s was largely descriptive and occasionally impressionistic, but seldom based on sound empirical technique. Moreover, most studies were limited to an examination of single Court systems, thus lacking any comparative perspective. Further, in most of these studies, the focus was on one aspect or stage of the Small Claims procedure, rather than on the Court system as a whole. Yngvesson and Hennessey cite the studies of Pagter *et al*⁶⁵(1964), Dellinger⁶⁶ (1972), Hollingsworth *et al*⁶⁷(1973) and Jones⁶⁸ (1974) as offering the most rigorous analyses of Small Claims procedures.⁶⁹

Pagter *et al* studied the Alameda City, California Small Claims Court with data being drawn from a random sample of 386 cases during 1963. Pagter found

(1977) 60 *Judicature* 260; Haemmel, 'The North Carolina Small Claims Court--An Empirical Study' (1973) 9 *Wake Forrest L. Rev.* 503; King, 'Measuring the Scales: An Empirical Look at the Hawaii Small Claims Court' (1976) 12 *Haw B.J.* 3; Minton & Steffenson, 'Small claims Courts: A Survey and Analysis' (1972) 55 *Judicature* 324; Muir, 'The Hawaii Small claims Court: An Empirical Study' (1976) 12 *Haw. B.J.* 18; Purdum, 'Examining the Claims of Small Claims Court: A Florida Case Study' (1981) 65 *Judicature* 25; Scobey, 'The Big Problem of Small Claims: An Empirical Analysis of the Providence Small Claims Court' (March 1980) 27 *RIBJ* 3; D. Skeen, 'Minor Dispute Resolution in North Dakota,' (1981) 57 *North Dakota Law Review* 163; Stauber, 'Small claims Courts in Florida: An Empirical Study,' (1980) 54 *Fla. B. Rev J.* 130; Steadman & Rosenstein, 'Small Claims' Consumer Plaintiffs in the Philadelphia Municipal Court: An Empirical Study' (1973) 121 *U. Pa. L. Rev* 1309; N. Vidmar, 'The Small Claims Court: A Reconceptualization of Disputes and an Empirical Investigation,' (1984) 18 *Law & Soc'y Rev.* 515; Comment, (1964) 'The California Small Claims Court,' 52 *Calif L. Rev* 876; ; Note, 'The Ohio Small Claims Court: An Empirical Study' (1973) 42 *U. Cin L Rev* 469; Massachusetts Public Interest Research Group, Inc, 'The Plight of the "People's Court": An Analysis of Massachusetts Small Claims Courts' (1982) Unpublished paper.

⁶⁴ B. Yngvesson and P. Hennessey, 'Small Claims, Complex Disputes: A Review of Small Claims Literature' (1975) 9 *Law and Society Review* 219.

⁶⁵ C. R. Pagter, R. McCloskey and M. Reinis, 'The Californian Small Claim Court' (1964) 52 *California Law Review* 876.

⁶⁶ R. W. Dellinger, 'An Observation Study of the Los Angeles Small Claims Court', unpublished MA Thesis, California State University at Los Angeles, 1972.

⁶⁷ E. W. Hollingsworth, B. Feldman, and D. C. Clark, 'The Ohio Small Claims Court: An Empirical Study' (1973) 42 *Cincinnati Law Review* 469.

⁶⁸ J. P. Jones, 'Practical Results of Court Reforms: The Politics of Small Claims Court,' (1974) Unpublished paper on file with Law and Society Review. Cited in Yngvesson and Hennessey, *op. cit.* 260.

⁶⁹ Yngvesson and Hennessey, *op. cit.* 229.

that 16 organisations accounted for nearly 45 per cent of all cases filed during the period studied, with the local government the most frequent and successful single user. This suggested a professional collection role for the Court and was in contrast to the original purpose of the Small Claims Court to provide an inexpensive, informal procedure for a plaintiff of limited means. This use of Small Claims Courts by business and government plaintiffs was not, according to Pagter, necessarily a negative development as it relieves superior Courts from the burden of handling petty claims. Pagter also found that small claims are not necessarily simple ones. Indeed, one judge interviewed by Pagter went so far as to maintain that the average small claim is likely to be more complex than the average claim made in non Small Claims Court cases.⁷⁰

Dellinger examined the Los Angeles Small Claims Court by observing for 100 hours, interviewing Court personnel and conducting a postal survey of plaintiffs. Like Pagter, Dellinger found business and government to be heavy users of Small Claims. However, unlike Pagter, Dellinger deplored this use as contrary to the intent of making civil justice accessible to the poor. The Dellinger study was also one of the first to examine the background of plaintiffs who used the Small Claims Court. The conclusion was that 'the individuals who filed small claims in both counties were fairly representative of the whole community' in terms of the categories examined. Based upon the observations, Dellinger found that many Small Claims hearings were rushed and conducted in a confusing atmosphere thus suggesting that there may not have been a full and meaningful judicial determination of the issues involved.⁷¹

In the Hollingsworth study, the methodology involved a random sample of 400 cases from Hamilton and 100 cases from Clermont, Ohio. Interviews were conducted of all individual and unrepresented sole proprietor plaintiffs. One of the major conclusions was that the presence of lawyers in a Small Claims proceeding had a pronounced negative effect on the atmosphere, especially the degree of informality.⁷²

⁷⁰ Pagter *op. cit.* 889-890; Yngvesson and Hennessey, *op. cit.* 258-259.

⁷¹ Dellinger, cited in Yngvesson and Hennessey, *op. cit.* 232, 252; See also, T. McFadgenm, 'Dispute Resolution in the Small Claims Context: Adjudication, Arbitration or Conciliation?' unpublished LLM Thesis, Harvard University, 1972..

⁷² Hollingsworth, *op. cit.* 472.

Jones studied the Small Claims System in Buffalo, New York. This study was the first to provide a detailed analysis of the impact of a lawyer on the case result. Jones found that plaintiffs who were represented were much more likely to succeed if the defendant had no legal representation. Hollingworth also found that represented businesses were awarded a significantly higher number of default judgments than parties who were not represented.⁷³

Although Small Claims studies were conducted in many United States jurisdictions⁷⁴ in the late 1970s and early 1980s, Weller, Ruhnka and Martin⁷⁵ carried out one of the few comparative Small Claims studies. Data were collected from fifteen Courts in fourteen American States. The Small Claims Court System as a whole was studied in each case and jurisdictions were chosen so they would include significant procedural variables currently in use across the United States. In each of the States studied, information was gathered from a random sample of 500 claims with questionnaires posted to plaintiffs and defendants. Finally, Small Claims trials were observed and interviews conducted with judges and other Court personnel. The avowed purpose of the study was to identify the types of small claim procedures which best reduce cost and delay and yet maximise access to all groups of society and assure fairness.⁷⁶

Among the major findings and suggestions for reform were:

- 1) No evidence existed that permitting collection agencies to utilise Small Claims had a 'chilling effect' on individual claims;

⁷³ Jones, cited in Yvngvesson and Henessey, *op. cit.* 243.

⁷⁴ See e.g., Alexander, 'Small Claims Courts in Montana: A Statistical Study' (1983) 44 *Montana Law Review* 227; Graham and Snortum, 'Small Claims Court: Where the Little Man has His Day' (1977) 60 *Judicature* 260; King, 'Measuring the Scales: An Empirical Look at the Hawaii Small Claims Court' (1976) 12 *Hawaiian Bar Journal* 18; Purdum, 'Examining the Claims of Small Claims Court: A Florida Case Study' (1981) 65 *Judicature* 25; Scobey, 'The Big Problem of Small Claims: An Empirical Analysis of the Providence Small Claims Court' (March, 1980) 27 *Rhode Island Bar Journal* 3.

⁷⁵ See S. Weller, J. C. Ruhnka and J. A. Martin, 'American Small Claim Courts' in Whelan (1990), *op. cit.* 3-23.

⁷⁶ *Ibid.*

2) Several Courts utilised special procedures, such as a separate docket for collection agency cases and special handling of default cases, to minimise the impact of collection agency matters on the remaining case load;

3) Regarding the use of lawyers in Small Claims, the findings showed that while most Small Claims litigants do not use lawyers at the trial stage, they do seek legal advice regarding their case. The major problem involved the inability of the *pro se* litigant, whether or not the opposing disputant was represented by a lawyer. Thus, the researchers favoured allowing legal counsel as long as steps are taken by judges to ensure the procedure does not become so formal that the unrepresented party is disadvantaged.

4) Twelve of the fifteen Courts studied distributed information booklets with varying degrees of information and usually distributed upon request. However, even the most detailed did not assist the litigant in determining whether the case was worth filing and all were heavily plaintiff oriented. The researchers recommend booklets which detail key matters in preparing for trial, explain Court procedures and rules and provide contact numbers for further information. The books should be distributed to both parties automatically and contain information for defendants as well as plaintiffs;

5) Many judges refused to allow clerks to give 'legal advice'. However, the researchers recommend that paralegals and Court clerks could easily be trained to provide this much needed service;

6) Most Court systems gave the judge the discretion regarding Court procedures, though it is important that every step be taken to ensure the case is decided on its merits. To this end, a few judges would leave the Court to view the physical evidence, phone witnesses in the presence of litigants, and readily continue a case to allow a party to bring additional evidence. Other judges, however, were uneasy about such unconventional procedures;

7) On the issue of judgments, the researchers recommend that fairness requires that disputants be given a decision and a brief explanation of the reasons for decision. It is also recommended that all judgments be paid through the Court with an automatic recording of satisfaction upon payment;

8) The findings showed that the costs to defendants or plaintiffs in using Small Claims was generally low, but rose dramatically when either lost wages were involved, or attorneys fees. On the first issue, the researchers recommend experimentation with night sittings, as is done in some Courts, and the importance of scheduling cases so that there is a maximum one hour waiting time from call to the beginning of trial. The expense attributed to legal fees underscores the importance of structuring Small Claims Courts, as far as possible, so that lawyers are unnecessary;

9) A final suggested reform related to the need for judgment collection to be an integral part of every Small Claims system, something which is not true of most Courts today. However, in this study, collection was less of a problem than suggested by other studies. Litigants were able to collect on their judgment 70 per cent of the time, with most collecting the total amount.⁷⁷

Weller, Ruhnka, and Martin emphasise that Small Claims systems are diverse, and this must remain so as each system is context bound and subject to diverse political, philosophical, economic, attitudinal and constitutional restraints. Small Claims Courts have proven to be more flexible and dynamic than other components of the system, a feature which should remain and indeed be encouraged.⁷⁸

Reflecting the growing interest in alternative dispute resolution mechanisms stressing mediation and conciliation, McEwen and Maiman⁷⁹ conducted a comprehensive investigation of the Maine Small Claims System. They contrasted three Courts using mediation and three which relied exclusively on adjudication of Small Claims cases. Extensive interviews were conducted with at least one party to the dispute in 97% of their sample of 403 cases; and with both parties in 75.2% of the cases.⁸⁰ Additional data was collected from Court

⁷⁷ *Ibid.*

⁷⁸ *Ibid.* 20-22.

⁷⁹ C. A. McEwen and R. J. Maiman, 'Small Claims Mediation in Maine: An Empirical Assessment' (1981) 33 *Maine Law Review* 237. See also, C. A. McEwen and R. J. Maiman, 'Arbitration and Mediation as Alternatives to Court' (1982) 10 *Policy Studies Journal* 712; C. A. McEwen and R. J. Maiman, 'Mediation in Small Claims Court: Achieving Compliance Through Consent' (1984) 18 *Law and Society Review* 11; C. A. McEwen and R. J. Maiman, 'In Search of Legitimacy: Towards an Empirical Analysis' (1986) *Law and Policy* 257.

⁸⁰ McEwen and Maiman (1981), *op. cit.* 245-257.

and mediation session observations, analysis of docket book information, and of State mediation reports.⁸¹ McEwen and Maiman found that mediation defendants who reached an agreement by consent were almost twice as likely to live up to the terms of their agreement than those disputants who complied with orders imposed upon them by a Court.⁸² Despite the greater satisfaction with mediation, the researchers found that many parties chose to initiate Court proceedings rather than first attempt mediation.⁸³ The reason appeared to 'lie in the nature of the consensual process and the limited circumstances under which it can operate.'⁸⁴ Negotiation tended only to work when both parties had something to gain. Accordingly, informal methods are unlikely to serve many parties unless they are 'intimately connected to some formal legal agency'⁸⁵. This research highlights the need to study Small Claims Courts in a wider context and further understanding of the nature of the 'symbiotic qualities of informal and formal justice'.⁸⁶

Most recently, Elwell and Carlson⁸⁷ conducted an empirical study of the Iowa Small Claims Court. They surveyed the Court records of three counties, as well as sending questionnaires to litigants, Court clerks and judges. The researchers found that with the exception of the enforcement of judgments, the Small Claims Court was performing well in providing a system of speedy, inexpensive and informal justice. Consistent with studies in other

⁸¹ McEwen and Maiman (1984), *op. cit.* 18-19.

⁸² *Ibid.* 11.

⁸³ *Ibid.* 45. This is consistent with other research. For example, research on neighbourhood justice centres and similar voluntary dispute resolution settings, reveals a disappointing public participation rate and a general failure to attract cases in off the street. Most cases involve referrals in which parties are strongly encouraged to attend. See e.g., P. Wahrhaftig, 'An Overview of Community-Oriented Citizen Dispute Resolution Programs in the United States' (1982) In R. L. Abel (ed) *The Politics of Informal Justice, Vol I: The American Experience* (New York: Academic Press) 77-85; J. Pearson, 'Child Custody: Why Not Let the Parents Decide?' 20 *The Judges Journal* 4

⁸⁴ McEwen and Maiman (1984), *op. cit.* 45.

⁸⁵ *Ibid.* 46..

⁸⁶ *Ibid.* See also, J. S. Auerbach, 'Burger's Golden Calf,' (March 3, 1982) *The New Republic* 1; see generally, R. L. Abel, 'The Contradictions of Informal Justice' in R. L. Abel (ed), *The Politics of Informal Justice: Vol I: The American Experience* (1982) (New York: Academic Press).

⁸⁷ S. Elwell and C. D. Carlson, 'The Iowa Small Claims Court: An Empirical Analysis' (1990) 75(2) *Iowa Law Review* 433.

jurisdictions.⁸⁸ They also found that businesses tended to be the most frequent users of the Small Claims Court and that there were a large number of default cases, most often involving individual defendant debtors.⁸⁹ Also, repeat users of the Court and those with legal representation were more likely to obtain a favourable judgment.⁹⁰

Among the needed reforms suggested by Elwell and Carlson were greater publicity to increase public awareness about the availability of the Small Claims Court and more information, especially about trial processes and collection procedure, provided to litigants. Interestingly, the authors rejected the idea of restrictions on businesses-use and legal representation in Small Claims, despite the popularity of such restrictions in other jurisdictions. The legislative history of the Iowa scheme, which suggested an intention to allow business use of the Small Claims Court, and the absence of evidence to suggest that heavy business use created any disincentive for Small Claims participation by individual claimants were the main reasons given for rejecting such reforms.⁹¹ Finally, Elwell and Carlson highlight the crucial role played by judges who are both highly skilled and empathetic to the goals of Small Claims Courts. The researchers concluded that such judges were instrumental in enabling the Small Claims Court to achieve the goals for which it was established:

Given that small claims judges determine to a great extent how well the goals of the small claims court are met, they should be particularly mindful of adhering to the role originally envisioned for them and their ability to mitigate the inherent inequities resulting from *pro se* or unrepresented status.⁹²

2.6 Development of Small Claims Courts in Canada⁹³

88 See Yngvesson and Hennessey, *op. cit.* 236.

68 Elwell and Carlson, *op. cit.* 483-486. Sixty-two percent of the plaintiffs were businesses while 72% of the defendants were individuals.

90 *Ibid.* 525.

91 *Ibid.*

92 *Ibid.* 526.

2.6.1 Description of Canadian Small Claims Systems

The development in Canada of special Courts and procedures to resolve small claims disputes resembles the pattern of development in the United States. Special Court procedures to handle small claims and debt collection were established early on,⁹⁴ but were largely ignored until the consumer movement of the 1960s generated considerable public interest and calls for further experimentation and reform.⁹⁵ Today Small Claims Courts hear the vast majority of all civil actions.⁹⁶ In Ontario, for example, over 120,000 claims are dealt with in the Small Claims Court each year. This contrasts with 35,000 actions in the General Division.⁹⁷

93 The description of Canadian approaches to small claims and evaluative research in Canada is drawn largely from I. Ramsay, 'Small Claims Courts in Canada: A Socio-Legal Appraisal' (1990) In Whelan (1990), *op. cit.* 25-48.

94 For example, Ramsay notes that Alberta's small claims court can be traced to the Small Debts Act 1918, SA 1918, s. 11. However, unlike the United States, Canadian reforms did not spark the same early critical comments such as Pound's famous article, 'The Causes of Popular Dissatisfaction with the Administration of Justice' cited above. See Ramsay, *op. cit.* 46.

95 Ramsay, *op. cit.* 25; See e.g., .Hon. T. G. Zuber, *Report of the Ontario Courts of Inquiry* (1987) (Toronto, Ontario Ministry of the Attorney General); A. M. Carter, 'Suggested Reforms in the Procedure in Small Claims court and the Adversary Process: More Problems of Function and Form' (1973) 51 *Can. Bar Rev* 583; G.W. Adams, 'Towards a Mobilization of the Adversary System', (1974) 12 *Osgoode Hall L.J.* 569; C.S. Axworthy, 'Controlling the Abuse of Small Claims Courts' (1976) 22 *McGill L.J.* 480; C.S. Axworthy, 'A Small Claims Court for Nova Scotia - Role of the Lawyer and the Judge', (1978) 4 *Dalhousie L. J.* 311; R. B. Spevakow, 'Small Claims for Alberta: Some Recommendations', (1979) 17 *Alberta L. Rev.* 244; R. Cooper and B. Kastner, 'Access to Justice in Canada: the Economic Barriers and some Promising solutions', in Cappelletti and Garth, *op. cit.* Vol 1, Book 1, 264-277; Canadian Institute for the Administration of Justice, *Cost of Justice: Papers Prepared for Presentation at the Canadian Institute for the Administration of Justice Conference on the Cost of Justice, held at Toronto on November 14 to 16, 1979* (Toronto, Carswell, 1980).

The relevant statutes are: *Provincial Courts Act*, SA 1978 (Alberta); *Revised Statutes of British Columbia* 1979, c. 387 as amended (British Columbia); ; *The Courts of Queens' Bench, Small Claims Practices Act, Re-Enacted Statutes of Manitoba*, Chapter c-285, 1987, Vol I (Manitoba); ; *RSNB* 1973, c. J-2, s. 73(2) as amended (New Brunswick); *Small Claims Court Act*, SNS, 1980, Chapter 16 as amended (Nova Scotia); *Small Claims Courts Act*, RSO 1980, c. 476 as amended *Courts of Justice Act*, 1984, S.O. 1984, c. 11; *Rules of the Provincial Court (Civil Division) [Small Claims Court]* O.Reg. 797/84, Amended, O. Reg. 158/85 (April 20, 1985); O. Reg. 654/86 (Jan 10, 1987) (Ontario); *RS PEI* 1974, c. J-3, s. 16(20) as amended (Prince Edward Island); *Small Claims Enforcement Act, Statutes of Saskatchewan* 1978, c. S-51 as amended (Saskatchewan).

96 J. F. Kenkel and W. S. Chalmers, *Small Claims Litigation* (1991) (2nd edn) (Toronto, Butterworths) 1.

97 *Ibid.* at 1, citing Hon. T. G. Zuber, *Report of the Ontario Courts of Inquiry* (1987) (Toronto, Ontario Ministry of the Attorney General) at 301.

In describing the Canadian approaches to small claims, Ramsay observes 'there is no possibility of mistaking them for anything but Courts'.⁹⁸ Most are Courts of record; judges are legally qualified and have contempt power; jurisdiction is specified by subject matter and amount⁹⁹; and while there are limits on the recover of costs, legal representation is generally allowed, with Quebec being a notable exception.¹⁰⁰

2.6.2 Research on Small Claims Courts in Canada

Since the 1960s Canadian Small Claims Courts have been the focus of a significant body of research. Studies by Sigurdson¹⁰¹, McIntyre¹⁰², Hildebrandt et al¹⁰³ and Ramsay¹⁰⁴ found that small businesses constitute the largest group of plaintiffs using Small Claims Courts, though individuals who sue other individuals in motor vehicle cases also represented a significant share of the Small Claims cases.¹⁰⁵ However, a careful analysis of the nature of Small Claims cases by Vidmar¹⁰⁶ suggests that the proclaimed heavy use of the Court by businesses may be somewhat inflated. This is because many business claims, on closer analysis, actually involve a consumer who refuses to pay because of dissatisfaction with some aspect of the product or sale. Thus the action is, in reality, a consumer complaint couched in the form of a counter-claim.¹⁰⁷

98 *Ibid.* 26-27.

99 *Ibid.* 27. Ranging from \$500 to \$3000 Canadian.

100 *Ibid.*

101 P. Sigurdson, 'Small Claims Courts and Consumer Access to Justice' (1977) In P. Sigurdson and L. Roine, *Consumer Redress Mechanisms* (Ottawa: Consumer Research Council).

102 M. E. McIntyre, 'Consumers and the Small Claims Courts', (1977) Unpublished MA thesis, Faculty of Graduate Studies, the University of Guelph, Ontario, 1977.

103 K. Hildebrandt, et al, 'The Windsor Small Claims Court: An Empirical Study of Plaintiffs and Their Attitudes' (1982) 2 *The Windsor Yearbook of Access to Justice* 87.

104 See Ramsay, *op. cit.*.

105 *Ibid.*

106 N. Vidmar, 'The Small Claims Court: A Reconceptualization of Disputes and an Empirical Investigation', 18 *Law and Society Review* 515.

107 *Ibid.* 545.

Canadian researchers have also investigated the relationship between Small Claims Courts and more informal methods of dispute resolution. Vidmar¹⁰⁸ found that 25% of claims filed never went to judgment, while Ramsay¹⁰⁹ found that 20% settled and 10% of cases were withdrawn. These figures suggest that a vital function of Small Claims Courts is to act as 'a bargaining lever, and perhaps a therapeutic means of "letting off steam".'¹¹⁰ Like McEwen and Maiman in the US, Ramsay calls for more evaluative research to further probe the relationship between Small Claims Courts and the continuum of other dispute resolution mechanisms such as negotiation, mediation and conciliation.¹¹¹

Other Canadian research has focused on the role of judges in Small Claims Court settings, noting that they are often uncomfortable with the inquisitorial role demanded of the Small Claims Court adjudicator.¹¹² Not surprisingly, these same judges have been the most adamant proponents for more lawyer involvement in Small Claims matters.¹¹³

Ramsay studied the problems with Small Claims enforcement especially in regard to the collection of debts. Even Vidmar's more realistic appraisal of business use of the Courts showed that debt collection by businesses, many of which resulted in default judgments, remained the single largest type of claim.¹¹⁴ These findings raise concerns about whether debtors are receiving adequate advice, and more fundamentally, whether Small Claims Courts are the best vehicle to handle debt collection.¹¹⁵

¹⁰⁸ *Ibid.* 525.

¹⁰⁹ See generally Ramsay, *op. cit.*.

¹¹⁰ *Ibid.* 31, citing A. Sarat, 'Alternatives in Dispute Processing: Litigation in a Small Claims Court' (1976) 10 *Law and Society Review* 371.

¹¹¹ *Ibid.* 45-46. Ramsay notes that most research to date has been from the perspective of the policy maker. He suggests the need for more ethnographic and historical research.

¹¹² *Ibid.* 32-33.

¹¹³ *Ibid.*

¹¹⁴ Vidmar, *op. cit.* 525.

¹¹⁵ Ramsay, *op. cit.* 41-44; see also W. A. Neilson, 'The Small Claims Court in Canada: Some Reflections on Recent Reforms,' (1982) 20 *Alberta Law Review* 475.

Finally, Court administration research has also been done on the development of an economic model to measure the costs of Small Claims Courts.¹¹⁶ Such studies, though of limited theoretical value, are nevertheless essential for planning and budgetary processes and if Courts are to be accountable for the expenditure of public resources. Such information also helps to ensure that disputes will be handled both economically and expeditiously.

In summary, the Canadian experience so far suggests that the Small Claims Court system has reduced costs and delay; however, it is unclear whether it has significantly increased access to justice. Indeed, Ramsay highlights the concern that alternative dispute resolution, as embodied in Small Claims procedures and other more informal alternatives, may result in these alternatives 'becoming the dumping-ground for overworked judges'.¹¹⁷ Ramsay concludes there is little evidence in the Canadian Small Claims experience of the characteristics of informal justice described by Abel:¹¹⁸

the preference for harmony over conflict, for mechanisms that offer equal access to the many rather than unequal privilege to the few, that operate quickly and cheaply, that permit all citizens to participate in decision-making rather than limiting authority to 'professionals', that are familiar rather than esoteric, and that strive for and achieve substantive justice rather than frustrating it in the name of form.¹¹⁹

2.7 Development of Small Claims Tribunals in New Zealand¹²⁰

¹¹⁶ Court Services Branch, Ministry of Attorney General and Canadian Centre for Justice Statistics, *Cost per Case: Small Claims Division*, Provincial Court of British Columbia (1985).

¹¹⁷ *Ibid.* 45.

¹¹⁸ R. Abel, 'The Contradictions of Informal Justice' in *The Politics of Informal Justice: Volume 1, The American Experience* (1982) (New York, Academic Press) 267, 310.

¹¹⁹ *Ibid.*

¹²⁰ The New Zealand experience is especially relevant to Tasmania for two reasons. First, by way of contrast, the 1976 New Zealand Act exemplifies a system which has

2.7.1 Description of the System

Though it had forerunners as early as 1846,¹²¹ the modern Small Claims Tribunal was established in New Zealand in 1976.¹²² This legislation enabled Referees, the vast majority of whom were non-lawyers,¹²³ to hear disputes involving up to \$500.¹²⁴ Emphasis was placed on an informal procedure and the absence of legal representation. Moreover, the 1976 legislation provided that the 'primary function of a Tribunal is to attempt to bring the parties to a dispute to an agreed settlement.'¹²⁵ If settlement was not possible, the Referee was given power to 'determine the dispute according to the substantial merits and justice of the case,'¹²⁶ having regard to the law but not bound to give effect to strict legal rights or obligations or to legal forms or technicalities.'¹²⁷ This means the Referee, while not free to disregard the law, may nevertheless depart from it if justice so requires.¹²⁸ Referees were also given wide powers to disregard exclusion clauses in contracts and to rewrite contracts which were

traditionally been more informal and less 'rule-bound' than Tasmania's small claim system which features a magistrate who is legally qualified, bound to follow the law and with less freedom to avoid giving effect to strict legal rights and obligations. Second, at the same time, however, the most recent New Zealand legislation and Tasmanian developments find the two systems conceptually moving toward each other. Further comparisons of the New Zealand and Tasmanian systems and the respective evaluations will be made throughout this study.

- 121 A. Frame, 'Fundamental Elements of the Small Claims Tribunal System in New Zealand' In C. J. Whelan (1990), *op. cit.* 73-74. Frame observed a number of small claims hearings and his article presents six case descriptions.
- 122 *Small Claims Tribunal Act* (New Zealand) 1976.
- 123 *Small Claims Tribunal Act* (New Zealand) 1976, s 24(5)
- 124 The monetary limit was raised to \$1000 in 1985.
- 125 *Small Claims Tribunals Act* (New Zealand) 1976, s 15(1).
- 126 *Small Claims Tribunals Act* (New Zealand) 1976, s 15(4))
- 127 *Small Claims Tribunals Act* (New Zealand) 1976, s 15(4)).
- 128 C. Hawes, 'Proposals to Reform Small Claims Tribunals in New Zealand'. Paper presented at AULSA 43rd Annual Conference, Tuesday, 30 August 1988. C. Hawes, 'Insurers and Small claims in New Zealand' (1989) 2 (2) *Insurance Law Journal* 131-136; C. Hawes, 'Functions and Reforms of Small Claims Tribunals in New Zealand' (March 1989) *Journal of Consumer Policy* 71-94; P. Spiller, 'A Review of the Disputes Tribunals of New Zealand' (March 1990) *New Zealand Law Journal* 109-112; see also comments of Lord Pearson in *Ishak v Thowfeek* [1968] 1 W.L.R. 1718, 1725 that the statutory requirement that decision makers 'shall have regard' to particular matters means that 'they must take them into account and consider them and give due weight to them, but they have an ultimate discretion. . . '.

found to be 'harsh and unconscionable'.¹²⁹ Unlike Small Claim Acts in some countries, corporations were not excluded from using the New Zealand Small Claims Tribunals. Finally, there was a limited right of appeal on the sole ground of unfairness of procedure.¹³⁰

After extensive evaluation by the Department of Justice,¹³¹ New Zealand repealed the 1976 legislation and enacted the Disputes Tribunals Act 1988, which came into force on 1 March 1991.¹³² The new Act raised the monetary limit to \$3000, and if both parties agree, to \$5000. The substantive jurisdiction under the new Act was also expanded to include cases in contract or quasi-contract as well as tort claims respecting the destruction or loss of, damage or injury to, and recovery of any property.¹³³

Another major change in the new legislation was to tone down the emphasis on the conciliatory role of the Court. This reform was supported by the Department of Justice study which found evidence that, while mediation and negotiation are admirable goals, there are many cases in which both justice and the law clearly favour one side of the dispute. In these circumstances, any Court 'pressure' to compromise is manifestly unjust in that it would require a party with a completely meritorious case to abandon, by agreement, some measure of the claim. The Department of Justice research found that parties frequently prefer that an order be made, rather than settling the matter themselves.¹³⁴ The new Act addresses these issues by providing that the Referee must determine whether, in all the circumstances, it is appropriate to assist the parties to negotiate an agreed settlement.¹³⁵ Where the parties

129 *Small Claims Tribunals Act* (New Zealand) 1976, s 16(e) (f).

130 *Small Claims Tribunals Act* (New Zealand) 1976, s 34.

131 *Small Claims Tribunal Evaluation*, Study Series 17, Vol 1, Policy and Research Division, Department of Justice, New Zealand, May 1986; P. Oxley, Vol 2, *Small claims Tribunal Evaluation: Discussion Paper*, Policy and Research Division, Department of Justice, New Zealand, May 1986.

132 See T. Eichelbaum, 'Court Structure Reform in New Zealand', (1990) (South Carlton, Victoria, Australian Institute of Judicial Administration) 114.

133 *Disputes Tribunals Act* 1988, s. 10(1)(c).

134 *Small Claims Tribunal Evaluation*, *op. cit.* Report 4, 99.

135 *Disputes Tribunals Act*, s 17.

negotiate a settlement, the Referee must approve it. The new Act also provides for a right of appeal against agreed settlements.¹³⁶

A major feature of the new legislation is the provision of a detailed procedure to be followed when one of the parties is insured.¹³⁷ Insured claimants must, with the lodgment of their claim, notify the Registrar of the name and address of their insurer who is then given notice of the hearing and declared to be a party to the action.¹³⁸ If the respondent is insured, their insurance company must also be notified and made a party.¹³⁹ The insured, however, remains in control of the action and the insurer is not permitted by subrogation to appear alone. The insured claimant is to have priority over the insurance company in regard to the recovery applicable to any uninsured loss.¹⁴⁰ If the total amount claimed by the insured and the insurer exceeds the jurisdictional limit, the Referee is empowered to strike off the claim and to require the insurer to give a written undertaking to commence legal proceedings in a higher Court.¹⁴¹

The new New Zealand legislation has added to the formality of the Small Claims procedure by requiring the Referee to make and provide to the parties a written record of the terms of any order or agreed settlement.¹⁴² Finally, the Act also requires the Referee to give reasons for their decisions. This may be done either orally or in writing at the conclusion of the hearing, with the additional provision that if a party within 28 days of the hearing's conclusion requests it, the Tribunal must provide its reasons in writing.¹⁴³

2.7.2 New Zealand Research on Small Claims

¹³⁶ *Disputes Tribunals Act*, s 17.

¹³⁷ See generally C. Hawes, 'Insurers and Small Claims in New Zealand' (1989) *Insurance Law Journal* 131-136.

¹³⁸ *Disputes Tribunals Act*, 1988, s 28.

¹³⁹ *Disputes Tribunals Act*, 1988, s 35.

¹⁴⁰ *Disputes Tribunals Act*, 1988, s 33.

¹⁴¹ *Disputes Tribunals Act*, 1988, s 34.

¹⁴² *Disputes Tribunals Act*, 1988, s 20.

¹⁴³ *Disputes Tribunals Act*, 1988, s 19.

As mentioned above, a comprehensive empirical investigation of the New Zealand Small Claims Tribunal was undertaken by the Policy and Research Division of the New Zealand Department of Justice in 1986.¹⁴⁴ The research design was unusually comprehensive and included: a) a public awareness survey of New Zealanders aged 18 years or over to assess awareness of Small Claims Tribunals; b) a survey of claims filed in all Small Claims Tribunals; c) a special study to predict the impact of raising the Tribunal's jurisdiction from \$500 to \$1000; d) a disputants survey of 332 claimants and 264 respondents from all over New Zealand; e) a case study of three Small Claims Tribunals; f) a special questionnaire for Referees; and g) a survey of Court staff.¹⁴⁵ The major findings¹⁴⁶ of this evaluation were:

1. That the Small Claims Tribunals in New Zealand do produce low cost and speedy resolution of disputes. As in Canada and the United States, a significant percentage (35%) of claims were settled or withdrawn prior to the hearing stage
2. Regarding the fairness of the dispute resolution process, the vast majority (84% of claimants; 75% of respondents) stated that they would use the system again. Complaints about unfairness most often centred on the process of mediation and evaluation of evidence. While these complaints could be addressed by a right of appeal, the study concluded that the gains from such a reform might be outweighed by the increased formality and delay accompanying such a procedure.
3. Referees required more training, especially in mediation and evaluating evidence. Support staff should receive training specific to Small Claims work. Such training should cover the philosophy of Small Claims Courts and Tribunals, the definition of 'in dispute' and the rationale for and the staffs' role in assisting disputants.

¹⁴⁴ *Small Claims Tribunal Evaluation*, Study Series 17, Vol 1, Policy and Research Division, Department of Justice, New Zealand, May 1986, at iii-iv.

¹⁴⁵ *Ibid.*

¹⁴⁶ P. Oxley, Vol 2, *Small claims Tribunal Evaluation: Discussion Paper*, Policy and Research Division, Department of Justice, New Zealand, May 1986, at 89-105.

4. The outreach of Small Claims Tribunals could be improved by more publicity targeted at under-represented groups, increasing the Tribunal's jurisdiction, and employing Referees with a wider range of backgrounds.

5. Several procedural reforms were also recommended, including a minimum number of days for notice of hearing to be set, the introduction of techniques to take evidence at a distance; clearer guidelines for Referees; and more effective enforcement provisions.

2.8 Conclusion

Interestingly, the New Zealand Small Claims Tribunal experience is remarkably similar to that of Canada and the US. This is despite the fact that New Zealand possesses a Tribunal, as opposed to a Court, that Referees are not legally qualified and that parties represent themselves without the assistance of lawyers. It is also interesting that disputant criticisms about unfairness led to the adoption of a limited right of appeal.¹⁴⁷ This evidences a value conflict which can occur between traditional guarantees of procedural fairness via rules of evidence and related procedures and the goals of informality and flexibility necessary to achieve inexpensive, expeditious and informal resolution of the dispute. Accordingly, the reform to permit appeals, has led some¹⁴⁸ to argue that the result is a greater formality of procedure which is inconsistent with the goal of a Small Claims Tribunal. Finally, it is important to see reiterated in NZ the US and Canada a conviction that specially trained and empathetic adjudicators and Court staff are crucially important to the success of any Small Claims System.

¹⁴⁷ *Disputes Tribunals Act 1989* (NZ), s 50.

¹⁴⁸ See G. P. Rossiter, 'Disputes Tribunals: Appeals to District Courts (August 1991) *New Zealand Law Journal* 266. The situation is further complicated by the fact that recent District Court decisions have been inconsistent in their approaches to the Disputes Tribunal decisions, some judges refusing to grant an appeal even when the Tribunal has clearly exceeded its jurisdiction; other cases granting an appeal when the District Court judge had had a different view on the merits of the case. See e.g. *Poutu v SIMU Insurance and Another* [1990] DCR 215; *Richardson Drilling Company Limited v New Zealand Railways Corporation* [1989] DCR 497. Cf P. R. Spiller, 'A Review of the Disputes Tribunals of New Zealand' (March 1990) *New Zealand Law Journal* 109 ('In Christchurch, of the more than 1100 matters heard over the past year, 28 have been taken on appeal, and of these only six have been allowed a rehearing ordered.' at 112); See generally, P. Smith, 'Small Claims: Back to an Adversarial Approach?' (1986) 5 *Civil Justice Quarterly* 292.

Chapter 3

Development and Major Features of Small Claims Courts and Tribunals in Australia Generally and Tasmania Specifically

3.1 Overview

The development of Small Claims Courts and Tribunals in Australia must be viewed within the context of a federal system in which the Commonwealth and individual States have each developed their own responses, both substantive and procedural, to the problems associated with the increasingly prohibitive costs of justice¹ and the unsuitability of the common law and its formal adversarial mechanisms to handle disputes involving small claims.² Attempting to resolve these problems, the 1970s and 1980s witnessed the creation, at State and Commonwealth levels, of a variety of new legislative reforms,³ Tribunals⁴ and Courts.⁵ One of the major solutions has been the establishment of Small Claims Tribunals or Courts in every Australian State and Territory.⁶

¹ See e.g., Submission of the Law Council of Australia, *The Cost of Justice: An Inquiry by the Senate Standing Committee on Legal and Constitutional Affairs* (1989).

² A. J. Duggan and L. W. Darvall (eds) *Consumer Protection Law and Theory* (1980) (Sydney, Law Book Co).

³ On the Commonwealth level, see e.g., *Trade Practices Act* 1974 (C'th) Part V. On the State level see e.g., *Fair Trading Legislation* in each State

⁴ See e.g., *Administrative Appeals Tribunal Act* 1975 (C'th); *Transport Accident Act* 1986 (Vic) (established no-fault motor accident compensation scheme); *Residential Tenancies Act* 1978 (S.A.) (established Residential Tenancies Tribunal).

⁵ See e.g., *Market Court Act* 1978 (Vic); See generally, T. Pagone and T. Cunningham, 'The Market Court Act' (1979) 6 *Mon. L. R.* 76..

⁶ *Small Claims Tribunals Act* 1973 (Qld); *Small Claims Tribunals Act* 1973 (Vic); *Small Claims Tribunals Act* 1974 (W.A.); *Local and District Criminal Courts Act* 1926 (S.A) Part VIIA (152a-152g); *Small Claims Ordinance* 1974 (A.C.T.), *Small Claims Amendment Act* (1991) (ACT); *Small Claims Act* 1974 (N.T.), *Small Claims Amendment Act* 1988 (NT); *Statute Law Revision Act* 1988 (NT) and *Local Court (Consequential Amendments Act)* 1989 (NT); *Consumer Claims Tribunals Act* 1987 (N.S.W.); *Magistrates Court (Small Claims Division) Act* 1989 (Tas); see generally C. N. Yin and R. Cranston, 'Small Claims Tribunals in Australia' in C. J. Whelan, *Small Claims Courts: A Comparative Study* (1990) (Oxford: Clarendon Press) 49-69; P. Latimer, *Australian Business Law* (1990) (Sydney, CCH) 492-497.

Consistent with the research from overseas,⁷ these Tribunals and Courts have been established to provide a mechanism for conciliation and settlement; where settlement is not possible, to provide an affordable means of dispute resolution; to provide consumers with access to justice even though their claim be small; to encourage traders to provide quality goods and services; and to ensure that Tribunal decisions are enforceable under the law.⁸ Generally speaking, Australian jurisdictions have adopted one of two types of structure. Historically, the first attempts to establish a procedure tailored to handle small claims was in the form of consumer claims Tribunals. In chronological order such Tribunals were established in Queensland, Victoria, NSW and Western Australia.⁹ The Queensland, Victorian and Western Australian statutes are uniform in most respects. In its statutory provisions, the NSW legislation, though similar in purpose, is distinct from the other three Tribunal States. The Small Claims Tribunals in these four States tend to have a fairly restrictive jurisdiction in that disputes are limited to those between consumers and traders. In contrast, Court-based models, with comparatively broader jurisdiction, were established in South Australia, Tasmania, the ACT and the Northern Territory. These models established a separate Small Claims division, but with more inquisitorial type procedures, within the umbrella of the existing Court structure.¹⁰

Regardless of their form, the increasing use of Small Claims Courts and Tribunals suggests they have been quite successful.¹¹ Since their inception in Australia, the growth in the number of cases handled by Small Claims Courts and Tribunals is striking.¹² For example, in South Australia, the figures for 1982 and 1983 indicate that of the 66,000 summonses issued out of the South Australian local Courts, 52,000 (79%) involved Small Claims.¹³ In Tasmania, the number of Small Claims cases

7 See generally, Whelan, *op. cit.*

8 See P. Latimer *Australian Business Law* (1990) (Sydney, CCH) 493-494.

9 See references to particular legislation in note 6 *op. cit.*

10 See J. Goldring, L.W. Maher, and J. McKeough, *Consumer Protection Law in Australia* (3rd edn) (1987) (Sydney, Butterworths) ss 1016-1037.

11 This is the general conclusion of most of the Australian studies (described below) For example, DeVaus, in his study of the Victorian Small Claims Tribunal, reported that approximately two-thirds of those surveyed stated that they would use the system again. ('The Small Claims Tribunal in Victoria: An Empirical Study', Report for the Ministry of Consumer Affairs, July, 1986).

12 One aberration seems to have occurred in the Northern Territory where for some reason the number of small claims dropped almost 60% between March and July of 1989.

13 Courts Department, *Report on Small Claims in South Australia*, Part 2 (April 1985) 1.

heard per year almost doubled between 1986 and 1991.¹⁴ In Victoria, Small Claims Tribunal cases increased from 1,587 claims lodged in 1975/76 to 3,537 claims in 1987/88.¹⁵ Finally, in the ACT Small Claims cases increased from 7,994 in 1982-83 to 11,200 in 1986-87; and in every year during that period, there were more Small Claims actions filed than any other type of civil action.¹⁶ In fact, most States have recently expanded the jurisdictional limit on claims which can be handled by Small Claims Courts or Tribunals;¹⁷ and the informal procedures of arbitration which characterise Small Claims mechanisms have been extended to Magistrates Courts in Victoria and NSW as a means of alternative dispute resolution.¹⁸

3.2 Jurisdiction

In Tasmania, South Australia, the ACT and the Northern Territory the Small Claims Courts are open to parties irrespective of whether they are consumers or traders and corporations and private sellers can sue or be sued in the Small Claims Court.¹⁹ NSW and Victoria limit Small Claims cases to those involving consumers.²⁰ However,

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- 14 E. Clark, 'The Tasmanian Small Claims Court: A Preliminary Report' (March, 1991), Chapter 3, s 3.2.1.
- 15 Report of the Director of Consumer Affairs (Vic) 1975-76, Appendix E.; 1987-88, Appendix 15
- 16 Attorney-General's Department, 1986-87 *Annual Report*, Canberra, ACT, p. 208.
- 17 The jurisdictional limit has risen steadily to where it is now \$6000 in N.S.W., \$5000 in Victoria and the N.T. and Qld, \$2000 in Tas, W.A. and the A.C.T.
- 18 Current Topics, 'Court-annexed arbitration in Magistrates' Courts in Victoria' (1986) 60 *A.L.J.* 594; cited in Latimer *op. cit.* 497.
- 19 *Magistrates Court (Small Claims Division) Act* 1989 (Tas), s 3.; *Small Claims Amendment Act* 1988 (NT); *Small Claims Ordinance* 1974 (ACT), s 4; See generally, Latimer (1990), *op. cit.* 495-486.
- 20 In Victoria 'Consumer' means a person, not being a corporation (other than a residential corporation), who buys or hires goods otherwise than for resale or letting on hire or than in the course of or for the purpose of a trade or business, or than as a member of a business partnership, or for whom services are supplied for fee or reward or who, as the insured party, enters into a contract of insurance otherwise than in the course of or for the purposes of a trade or business, or than as a member of a business partnership *Small Claims Tribunals Act* 1973, s 2(1). A residential corporation is a body corporate which carries on residential development, eg flats, units etc (s 2(1)). In NSW, 'Consumer' means: '(a) a natural person; (b) a firm; (c) an exempt proprietary company; (d) a body corporate constituted under the *Strata Titles Act* 1973 or under the *Strata Titles (Leasehold) Act* 1986; (e) a company that owns an interest in land and has a memorandum or articles of incorporation conferring on each owner of shares in the company a right to occupy under a lease or licence a part of parts of a building erected on the land; (f) an unincorporated association ; or (g) an unincorporated body whose members are associated for a common purpose to whom or to which a supplier has supplied or agreed to supply goods or services, whether under a contract or not, or with whom or which a supplier has entered into a contract that is collateral to a contract for the supply of goods or services.' *Consumer Claims Tribunals Act* 1987 (NSW), s 3(1); See *TOP Transport Pty Ltd v*

Victoria,²¹ but not NSW,²² further restricts the definition of 'consumer' to private persons and does not include a corporation or business consumer. In Queensland claimants can, in addition to consumers, include plaintiffs under the *Dividing Fences Act* 1953 (Qld).²³ In the Small Claims legislation of most States, 'trader' is defined as a person carrying on the business of supplying goods or services.²⁴ Thus, someone purchasing goods for resale, or purchasing goods other than in the course of business (eg purchasing goods second hand from a private vendor) is denied the benefit of Small Claims procedures. However, in three Australian States²⁵ the definition of trader also includes residential tenancies;²⁶ and in NSW²⁷ 'trader' would include professional persons.²⁸

The definition of 'small claim' varies widely amongst jurisdictions, though the definition in all jurisdictions would include contracts arising out of the sale of goods or the provision of services. For example, 'small claim' in Tasmania includes claims arising out of a contract, quasi-contractual obligation or damage to property.²⁹ In some jurisdictions³⁰ the definition of 'small claim' does not include a claim only for

Registrar, Consumer Claims Tribunal (1984) ASC 55-355, SC (NSW). In Victoria a 'trader' means a person who, in the field of trade or commerce, carries on a business of supplying goods or providing services or, as insurer, of entering contracts of insurance or who regularly holds out as ready to supply goods or provide services of a similar nature or enter into such contracts, *Small Claims Tribunals Act* 1973 (Vic), s 2(1).

- 21 *Small Claims Tribunals Act* 1973 (Vic), s 2(1).
- 22 *Consumer Claims Tribunals Act* 1987 (NSW), s 3, 'consumer claim' includes businesses in their capacity as consumers.
- 23 Note that the Queensland legislation also extends jurisdiction to a person claiming under the *Dividing Fences Act* 1953 (Qld) for any claim up to \$1500.
- 24 In NSW for example, 'supplier' means a person who, in carrying on or purporting to carry on a business supplies goods or services, *Consumer Claims Tribunals Act* 1987 (NSW) s 3(1). Trade or commerce includes any business or professional activity (s 3(1)).
- 25 Queensland, Western Australia and Tasmania.
- 26 See e.g., *Small Claims Tribunals Act* 1973 (Qld), s 4; *Small Claims Tribunals Act* 1974 (WA), s 4.
- 27 *Consumer Claims Tribunal Act* 1987 (NSW), s 3(1). Services includes: (a) the performance of work (including work of a professional nature) whether with or without the supply of goods.
- 28 Professionals, however, are not included within definition of 'trader' in Victoria. See *Fawke v Holloway* [1986] VR 411.
- 29 *Magistrates Court (Small Claims Division) Act* 1989 (Tas), s 3.
- 30 See e.g., *Magistrates Court (Small Claims Division) Act* 1989 (Tas), s 3; *Small Claims Tribunals Act* 1973 (Vic) s 2(1). However, in WA and NSW, the definition of small claim

relief from a payment obligation. There must be some genuine dispute arising out of the contract involved. The purpose of such a restriction is to prevent the monopolisation of Court resources by those who would otherwise turn the Small Claims Court into a cheap vehicle for debt collection.

The Victorian³¹ definition of small claim has been extended to cover insurance contracts, but not life insurance; while in Western Australia,³² insurance contracts are included, but not claims arising out of contracts for motor vehicle or workers compensation insurance. Queensland,³³ Tasmania³⁴ and Western Australia³⁵ also include in their definition of small claim, the recovery of bonds in residential tenancy agreements. Finally, some States³⁶ also include within the definition of small claims, compensation claims up to the prescribed jurisdictional amount in respect to property damage arising out of motor accidents.

As to the monetary size of the claim, the jurisdictional limit in Tasmania, South Australia, and the ACT is \$2000; in Victoria, Queensland and the Northern Territory \$5000, and in Western Australia \$6000.³⁷ In NSW the jurisdictional limit is \$6000 in the case of a consumer claim and \$10,000 for a building claim.³⁸ Some jurisdictions³⁹ also have statute of limitation provisions specifically for small claims, while others rely on general provisions governing contracts, torts, etc.

includes 'a claim for 'relief from payment' *Small Claims Tribunals Act* 1974 (WA) s 11; *Consumer Claims Tribunals Act* 1987 (NSW) s 3(1).

31 *Small Claims Tribunal Act*, s 2.

32 *Small Claims Tribunal Act*, s 4.

33 *Small Claims Tribunals Act*, s 4.

34 *Magistrates Court (Small Claims Division) Act* 1989 (Tas), s 3.

35 *Small Claims Tribunals Act*, s 4.

36 See *Small Claims Tribunals Act* 1973(Qld), s 4(1); *Magistrates Court (Small Claims Division) Act* 1989 (Tas), s 3(1).

37 See generally, *Consumer Sales and Credit Law Reporter* (Sydney, CCH) 45-000 et seq.

38 *Consumer Claims Tribunals Act* 1974 (NSW) s 32; *Consumer Claims Tribunal Regulations* 1988, cl 6. Note that in NSW, unlike the other States, the jurisdictional limit is not based on the amount claimed, but the total in value or money of orders made by the Tribunal.

39 In NSW, for example, a claim will be barred if it is lodged more than three years after the supply of goods or services, *Consumer Claims Tribunals Act* 1974 (NSW) s 10(4); *Consumer Claims Tribunal Regulation* 1988, cl 4; In Victoria and WA the cause of action giving rise to the claim must not have arisen more than two years previously (See *R v Levine; Ex parte de Jong* [1981] VR 131, at 135 per Murray J.).

Finally, the legislation in each State and Territory prohibits a person from contracting out of the right to initiate a case in the Small Claims Court or Tribunal.⁴⁰ Also, the Small Claims legislation applies notwithstanding a provision in a contract that the proper law of the contract is the law of a place other than the jurisdiction in which the particular Small Claims Court or Tribunal is located.⁴¹

3.3 Emphasis on Conciliation/Mediation⁴²

A major feature of Small Claims Courts or Tribunals which distinguishes them from more formal and traditional adversary system dispute resolution methods is the emphasis on conciliation or settlement of disputes. Typical is the Tasmanian legislation which specifically declares the settlement of disputes to be the primary aim of the Magistrate:

8(1) The primary function of a magistrate sitting in the small claims division is to attempt to bring the parties to a dispute that involves a small claim to a settlement acceptable to all the parties.

(2) Where it appears to a magistrate to be impossible in a particular dispute involving a small claim to achieve a settlement acceptable to all the parties to the dispute, then, subject to section 24 (1) (a), the function of the magistrate is, after hearing and determining the issues in dispute, to make an order with respect to that issue or, if he thinks the case so requires, an order dismissing the small claim.⁴³

Similarly, the NSW Act provides that the Consumer Claims Tribunal must use its best endeavours to bring the parties to an acceptable settlement. Only then, can the matter be adjudicated.⁴⁴

⁴⁰ See e.g., *Consumer Claims Tribunals Act* 1974 (NSW) s 39; *Small Claims Tribunals Act* (Vic) s 40; *Small Claims Tribunals Act* (WA) s 39.

⁴¹ See e.g., *Magistrates Court (Small Claims Division) Act* 1989 (Tas), s 5; See also, NSW s 39, Vic s 36, Qld s 40, WA s 39.

⁴² As pointed out in chapters 4 (s 3.10) and chapter 6 (s 6), there is no agreement on exactly what is meant by conciliation or mediation.

⁴³ *Magistrates Court (Small Claims Division) Act* 1989 (Tas), s 8. This section refers to s 24(1) (a) which is discussed below. It provides that the Magistrate is not bound by the formal rules of evidence and may inform himself any matter in any manner he thinks fit.

⁴⁴ *Consumer Claims Tribunals Act* 1987 (NSW), s 29(1).

In Tasmania,⁴⁵ the Northern Territory⁴⁶ and the ACT⁴⁷ there is also provision for preliminary conferences in Small Claims matters. These conferences are presided over by the Clerk of Petty Sessions in the ACT, by the Deputy Registrar or other delegated Court officer in Tasmania, and by the Magistrate or Clerk in the Northern Territory. The purpose of such preliminary conferences is to ensure that the case is ready for hearing; to determine the likely length of proceedings; and to facilitate, where indicated, the possible settlement of the claim.

The actual degree of conciliation and the form which it takes varies considerably amongst jurisdictions and even among Magistrates and Referees within each jurisdiction.⁴⁸ For example, Ingleby⁴⁹ found a wide variety of approaches utilised by Small Claims Referees. Some Small Claims Tribunal Referees, especially those more accustomed to more formal proceedings in higher Courts, adopt a passive role. They inquire about the possibility of settlement and give the parties an opportunity to confer, but deliberately refrain from becoming actively involved. In contrast, other Referees were active players in the conciliation process, urging disputants to settle their differences and suggesting proposals. Recent literature on alternative dispute resolution mechanisms suggests there may be problems with both approaches. These issues are discussed more fully below.

3.4 Small Claims Procedures

Though there are differences in each State, the major features of Australian Small Claims procedures are as follows:

Liberal Joinder

Joinder rules are liberally applied to allow other parties to be brought into the proceedings, as long as they have notice and an interest in the resolution of the

45 *Magistrates Court (Small Claims Division) Act 1989* (Tas), s 37(4).

46 *Small Claims Amendment Act 1988* (NT), s 9, *Small Claims Rules* (Order 18).

47 *Small Claims (Amendment) Ordinance 1985* (ACT), s 10A.

48 C.N. Yin and R. Cranston, 'Small Claims Tribunals in Australia', in Whelan (1990), *op.cit.* 59-60.

49 R. Ingleby, *In the Ball Park: Alternative Dispute Resolution and the Courts* (1991) (Carlton South, Victoria, Australian Institute of Judicial Administration) at 21-26.

dispute.⁵⁰ However, this is not to say that joinder will be used as a means to institute third party claims, but only as a device to ensure the presence of all relevant parties to the dispute.⁵¹

Private Hearings

Hearings are usually private⁵² and with no transcript taken of the hearing. However, the degree of privacy varies.⁵³ For example, in NSW interested persons may attend the hearing; in WA relatives and friends of any party and Consumer Affairs officers may be present unless the Referee orders otherwise. In Tasmania⁵⁴ the parties may consent to an observer; while in Queensland everyone is excluded, including new Referees seeking to observe the system in operation.⁵⁵ General statistics regarding claims filed in the Small Claims Court are maintained, but no reporting of individual cases is allowed.

Informal Hearings

Hearings are more informal than those of traditional adversarial Courts. Technical rules of evidence do not apply and all relevant information, whether hearsay or not, is generally admissible. For example, the Tasmanian legislation provides that the hearing be conducted with as much informality, as little technicality, and as expeditiously as possible, given the requirements of the Act and proper consideration of the issues.⁵⁶ Courts and Tribunals, however, must conform to the rules of natural justice.⁵⁷ While evidence is usually required to be given under oath,⁵⁸ no record is

⁵⁰ *Consumer Claims Tribunals Act* (NSW), ss 14, 15; *Small Claims Tribunals Act* (Vic) s 24; *Small Claims Tribunals Act* (Qld) s 26; *Small Claims Tribunals Act* (WA), s 26; *Magistrates Court (Small Claims Division) Act* (Tas), s 15(1). In Tasmania, it is not clear from the wording of the legislation whether in motor vehicle accident cases, insurance companies are a legal party in interest. Most Magistrates are of the view that insurance companies are parties in interest and therefore have a right to participate in the small claim hearing.

⁵¹ See *Ex parte Majeau Carrying Co Pty Ltd* [1985] 1 Qd R. 349. See also *Canclar Nominees Pty Ltd v Judge* (1983) ASC 55-253.

⁵² See e.g., *Magistrates Court (Small Claims Division) Act* 1989 (Tas), s 23(1); *Small Claims Tribunals Act* 1973 (Qld), s 18(1); Exceptions are South Australia, Victoria (*Small Claims Tribunals Act* 1973, s 31) and the ACT *Small Claims Act* 1974 (ACT), s 18). Even in these states, however, the adjudicator may order the hearings to be in private.

⁵³ See Yin and Cranston (1990), *op. cit.* at 60-61.

⁵⁴ *Magistrates Court (Small Claims Division) Act* 1989 (Tas), s 23(2).

⁵⁵ *Magistrates Court (Small Claims Division) Act* 1989 (Tas), ss 60-61.

⁵⁶ *Magistrates Court (Small Claims Division) Act* 1989 (Tas), s 24(1)(c).

⁵⁷ See e.g., *Consumer Claims Tribunals Act* 1987 (NSW), s 17.

required to be kept of the evidence from the proceedings apart from the requirement that the Magistrate must make a summary of the facts in issue as determined and any order which is made.⁵⁹

In most jurisdictions, attempts have been made to conduct Small Claims hearings in more informal surroundings. The Referee or Magistrate does not wear judicial garb and sits at a table with the disputants or presides on a slightly raised platform. However, in those jurisdictions with Small Claims Courts, as opposed to Tribunals, the physical limitations of existing buildings have not always been conducive to such informality. Thus, for example, in Launceston and Burnie in Tasmania, Small Claims cases are heard in the same formal court-room utilised for the Court of Requests and Petty Sessions. Also, Small Claims disputants have no separate waiting room and must take their place amongst criminal defendants and others awaiting trial. The physical constraints of existing facilities and failure of Courts to respond to consumer convenience is discussed below. To further improve access, Small Claims Courts or Tribunals visit country areas. This is crucial in states like Tasmania where there is a widely dispersed population and in other states in which there are long distances between cities.

Inquisitorial: Magistrate as Participant

In keeping with a more inquisitorial style hearing, some jurisdictions⁶⁰ also empower the Magistrate or Referee to appoint, at the Crown's expense, a person to inquire and report on any question of fact arising in the proceeding. The actual weight, however, to be afforded the conclusions reached by such a report will be determined by the trier of fact. In Tasmania, the Small Claims Magistrate often utilises the expertise of the Office of Consumer Affairs regarding building disputes, claims for faulty repairs, and so on.

Absence of Lawyers

⁵⁸ An exception is the ACT, *Small Claims Act* 1974 (ACT), s 18.

⁵⁹ *Small Claims Act* 1974 (ACT), s 25(4).

⁶⁰ See e.g., *Magistrates Court (Small Claims Division) Act* 1989 (Tas), s. 24(1)(b) and similar provisions in the Queensland legislation. In the ACT, the court has the power to appoint an investigator to inquire into and report upon any question of fact, *Small Claims Act* 1974, s 27. Section 23(4) of the NSW legislation provides that the tribunal may inform itself in such manner as it considers appropriate. However, s 24 also provides that if a party is not present, the Tribunal is to act on the available evidence and may make an order accordingly.

The simplified Court procedure is designed to encourage parties to appear *pro se*.⁶¹ In most jurisdictions, legal representation is not allowed unless the Referee or Magistrate and the opposing party agree, or the Magistrate is satisfied that the unrepresented party will not be unfairly disadvantaged by such an appearance.⁶² However, parties, who are themselves lawyers, may appear on their own behalf. Other 'agents' are also permitted, at the discretion of the Magistrate or Referee, in special circumstances. Thus one spouse might appear on behalf of another who cannot be present; a parish priest might appear with a parishioner who is illiterate or speaks little or no English; and officers may appear on behalf of their company.⁶³

Legally Qualified Magistrate/Referee

In contrast to more informal systems, such as that adopted by New Zealand,⁶⁴ Australian Small Claims Courts and Tribunals are in most states⁶⁵ presided over by Referees and Magistrates with legal qualifications. However, Referees do not have to possess legal qualifications in NSW, and prior to February 1979, Queensland Referees were not required to be legally trained.⁶⁶ Decisions in Australian Small Claims Courts and Tribunals must generally be in accordance with the law. The Queensland legislation gives the Tribunal the power to do what is 'fair and equitable'; however, in practice the law is a major factor in making that determination.⁶⁷ Finally,

61 Legal representation is permitted in the ACT and Northern Territory, but in other jurisdictions lawyers are permitted only in special circumstances. Note that lawyers are allowed to appear in ACT Small Claims Courts, *Small Claims Act* 1974 (ACT), s 42.

62 *Magistrates Court (Small Claims Division) Act* 1989 (Tas), s 22(3); *Small Claims Tribunals Act* 1973 (Vic) s 30; *Consumer Claims Tribunals Act* 1987 (NSW) s 21; *Local and Districts Court Act* 1926 (ACT), s 152b(1).

63 See e.g., *Magistrates Court (Small Claims Division) Act* 1989 (Tas), s 22(2); *Local and Districts Court Act* 1926 (ACT), s 152b(3).

64 *Disputes Tribunals Act* 1988 (New Zealand).

65 See e.g., *Small Claims Tribunals Act* 1973 (Vic), s 6; *Magistrates Court (Small Claims Division) Act* 1989 (Tas), s 31 (Orders must be made by a Magistrate); Legal qualifications are not required of NSW referees, *Consumer Claims Tribunals Act* 1974 (NSW), s 4. However, building claims must be heard by a building disputes referee who is required to have extensive experience in the building industry (s 4A).

66 See generally, *Consumer Sales and Credit Law Reporter* (Sydney, CCH) 45-260.

67 *Small Claims Tribunals Act* 1973, s 10; See *R v Judges of Brisbane District Court; Ex parte Kruger Enterprises* [1982] Qd R 623 at 628 per McPherson J; Cf *Jet 60 Minute Cleaners Pty Ltd v Brownette* [1981] 2 NSWLR 232.

some jurisdictions empower a Referee to transfer to a higher Court⁶⁸ or more experienced Referee⁶⁹ any case which involves a complex issue of law.

Limited Rights of Appeal

Prerogative writs or writs of certiorari or prohibition are allowed in every jurisdiction in cases where the Tribunal has no jurisdiction,⁷⁰ has exceeded its jurisdiction, or where there has been a denial of natural justice.⁷¹ Other than these limited grounds, however, in all Australian jurisdictions, except South Australia⁷² and, to a limited extent, the ACT⁷³ there is no right of appeal from a decision made by a Small Claims Court or Tribunal.⁷⁴ The underlying rationale for the prohibition on appeals is that facilitating such appeals would significantly add to the cost, delay and formality of proceedings - all primary goals which underlie the primary justification for establishing special procedures to handle small claims. To date requests for judicial review of Small Claims decisions have been rare.⁷⁵ Moreover, appellate Courts have been sympathetic to the aims of Small Claims Courts and Tribunals and have seldom upheld an appeal.⁷⁶

⁶⁸ *Small Claims Tribunals Act* 1974 (WA), s 17A; *Magistrates Court (Small Claims Division) Act* 1989 (Tas), s 27.

⁶⁹ *Consumer Claims Tribunals Act* 1987 (NSW), ss 14(4)-(6), s 18(2).

⁷⁰ See e.g. *R. v Levine ex parte De Jong* (1981) VR 131; *Constantine v Davies* (1984) ASC 55-312.

⁷¹ See e.g., *Magistrates Court (Small Claims Division) Act* 1989 (Tas), s 32(2); *Small Claims Tribunals Act* (Vic), s 17; For a case where a small claims judgment was challenged on the grounds of denial of natural justice see *K & H Atkins Pty Ltd v Cunningham & Anor* (1981) 2 NSWLR 288.

⁷² In South Australia there is a right of appeal to a Local Court of full jurisdiction, *Local and District Court Act* 1926 (SA) s 152g.

⁷³ In the ACT a judgment of the Small Claims Court is final and conclusive. However, leave may be granted to the Supreme Court on a question of law, or where the conduct of the proceedings was unfair, *Small Claims Act* 1974 (ACT) s 33.

⁷⁴ *Small Claims Tribunal Act* 1973 (Qld), s 19; *Small Claims Tribunals Act* 1973 (Vic), s 16; *Small Claims Act* 1974 (ACT) ss 4; *Magistrates Court (Small Claims Division) Act* 1989 (Tas), s 32. The absence of a right of appeal exists, even though by statute in Tasmania, Victoria and Western Australia, the referee or magistrate is required to have regard to the law. Note that in New South Wales and Queensland the referee or magistrate must render the decision according to principles of fairness and equity. In practice, there is not likely to be any difference between the two standards.

⁷⁵ Yin and Cranston (1990), *op. cit.* 61. See e.g. *ex parte Barwiner Nominees Pty Ltd* (1975) VR 949; *Thompson v Consumer Claims Tribunal & Ors* (1981) 1 NSWLR 68.

⁷⁶ Yin and Cranston, *op. cit.* 61, refer to *K and H Atkins Pty Ltd v Cunningham* [1981] 2 NSWLR 288 in which the Court held it was a denial of natural justice to deny a party the opportunity to challenge a ruling on the court's jurisdiction; and to *R. v Small Claims*

Because of the limitations on appeal the Small Claims Magistrate or Referee in most States⁷⁷ is not required to give reasons for the decision. In practice, however, it is the writer's experience that most Small Claims adjudicators do give reasons for their decisions. As discussed in the findings from the present study, the author's observations and interviews of the Tasmanian system revealed that the Magistrate in every case gave either written or oral reasons, even though not required to do so by statute.

Enforcement

The Small Claims Court or Tribunal is given the power to make various orders which are limited by the particular definition of 'small claim', 'consumer claim' and monetary amount specified in the particular jurisdiction's legislation.⁷⁸ Typically, Small Claims legislation empowers a Court or Tribunal to order a party to pay a sum of money; to make a declaration that a party does not owe money to a person specified in the order; to order that a party perform work, replace goods, or rectify defects in a product.⁷⁹

In NSW⁸⁰ there is, in addition to the normal orders, a provision which empowers a Referee to report to the Commissioner for Consumer Affairs on the conduct of a supplier and the Commissioner may compile and publish a list of unsatisfactory suppliers.⁸¹ If the supplier is required to be licensed or is a member of a trade organisation, the Commissioner may provide a copy of the report to the relevant body. In Tasmania⁸² the Administrator of the Magistrates Court must publish the names of

Tribunal, ex p. Cameron [1976] VR 427 in which the reviewing court quashed a tribunal order because prior notice of an supplementary claim, subsequent to the original claim, was not given to a respondent.

⁷⁷ Victoria is an exception in that the *Administrative Law Act* 1978 (Vic) s 8, requires the Small Claims Tribunal upon request to give written reasons for the particular decision within a reasonable time. Also, s 34A of the *Small Claims Tribunals Act* 1974 (WA) provides that a referee may give written reasons for his/her decision and is bound to do so upon request of a party made within 30 days of the order.

⁷⁸ See *Small Claims Tribunals Act* 1973 (Qld), ss 18-21; *Consumer Claims Tribunals Act* 1987 (NSW) ss 30-36; *Small Claims Tribunals Act* 1973 (Vic), ss 18-21, 32; *Small Claims Tribunal Act* 1974 (WA), ss 17, 21-22; *Small Claims Act* 1974 (ACT), ss 4(1), 5, 22-24.

⁷⁹ See e.g., *Magistrates Court (Small Claims Division) Act* 1989 (Tas), s 29(3).

⁸⁰ *Consumer Claims Tribunals Act* 1987 (NSW), s 41.

⁸¹ *Consumer Claims Tribunals Act* 1987 (NSW), s 42.

⁸² *Magistrates Court (Small Claims Division) Act* 1989 (Tas), s 33.

claimants and respondents; a summary of the orders; and particulars of the issues in dispute.

In those States having Small Claims Courts as opposed to Tribunals, a decision of the Small Claims Magistrate constitutes a Court judgment. Furthermore, for purposes of collection, such judgments are deemed to be orders of the Court of Requests and enforceable in the same way as such orders.⁸³ In contrast, orders of Small Claims Tribunals, in NSW for example, the order of the Consumer Claims Tribunal does not itself have the status of a judgment, and registration of the order is essential.⁸⁴

Costs

Costs normally cannot be awarded against the loser.⁸⁵ In Tasmania costs may be awarded in some cases, most notably where, in the Magistrate's opinion, the claim was frivolous or vexatious.⁸⁶ Also, in a case transferred from the Court of Requests, the Magistrate may award costs incurred up to and including the commencement of the claim in the Small Claims Court.⁸⁷ In Western Australia the Referee may award costs up to \$100 where an injustice would otherwise be done.⁸⁸ Finally, in South Australia, costs are not generally awarded, but the legislation empowers the Magistrate to award costs where legal representation is involved or special circumstances require it.⁸⁹

⁸³ *Magistrates Court (Small Claims Division) Act* 1989 (Tas), s 29(8). Note that in a recent amendment to the ACT legislation, judgment orders no longer have to be paid to the clerk of the court, but the court may direct how an amount is to be paid. This is likely to relate specifically to situations in which the Court may direct the Director of Rental Bonds to pay money directly to the lessor or lessee. *Small Claims (Amendment) Act* 1991 (ACT). See also, *Consumer Sales and Credit Law Reporter* 53-573.

⁸⁴ *New South Wales Consumer Claims Tribunals Act* 1973 (amended in 1976, 1977, 1979, 1981, 1985, 1986) s 23, cited in Yin and Cranston, *op. cit.* 58.

⁸⁵ *Small Claims Tribunal Act* 1973 (Qld), s 35 (but respondent may be ordered to pay claimant's filing fee); *Consumer Claims Tribunals Act* 1987 (NSW), s 28; *Small Claims Tribunals Act* 1973 (Vic) s 33; ; See generally, Latimer (1990), *op. cit.* 496-498; Yin and Cranston (1990), *op. cit.* 51-64; *Small Claims Act* 1974 (ACT), s 29(1).

⁸⁶ *Magistrates Court (Small Claims Division) Act* 1989 (Tas), s 28(3).

⁸⁷ *Magistrates Court (Small Claims Division) Act* 1989 (Tas), s 28(3).

⁸⁸ *Small Claims Tribunal Act* 1974 (WA), s 35.

⁸⁹ *Local and District Courts Act* 1926 (SA), s 152d; See Yin and Cranston (1990), *op. cit.* at 64. While allowing costs adds to the formality and technicality of small claims procedure and arguably discourages access, there is a strong argument that the small claims court magistrate should have more power to award costs, especially in cases where a rehearing is granted and the party does not show up; to help alleviate the costs of expert witnesses, and so on.

3.5 A Description of the Tasmanian Small Claims Court System

3.5.1 Introduction

A brief historical sketch of the Tasmanian Small Claims Court was presented in Chapter 1; and the first part of the present chapter provided a description of the development of Small Claims Courts and Tribunals in Australia generally. The purpose of this section is to present an overview of the main features of the Tasmanian Small Claims Court. Specific aspects of the Court will be analysed in detail in the presentation and analysis of results found in Chapter 6. The provisions of the Small Claims Court are found in the *Magistrates Court (Small Claims Division) Act 1989* (Tas) together with accompanying Statutory Rules.⁹⁰

3.5.2 Administration

Tasmania, rather than establishing an independent Small Claims Tribunal, opted for a single Court system of which Small Claims jurisdiction is an integral part. In doing so, Parliament accepted the recommendation of the 1982 Law Reform Commission Report. The reasons for establishing a Court rather than a Tribunal were enumerated by then Attorney-General, Mr Pearsall:

1. The creation of a separate tribunal would require the creation of a separate costly bureaucratic structure. By assimilating the tribunal into the existing court structure, the administrative costs are greatly reduced. Existing court staff will carry out the necessary functions.
2. Because of the greatly expanded jurisdiction to be given to this court, it is wholly inappropriate for it to be known as a consumer claims tribunal, whose jurisdiction must necessarily be limited to claims between consumer and trader.
3. The creation of a separate tribunal would create two tiers of justice, thus setting trends for further specialist tribunals ultimately leading to a distortion of the common law.⁹¹

⁹⁰ Statutory Rules 1989, No. 125, *Magistrates Court (Small Claims Division) Regulations 1989* (hereinafter 'Small Claims Regulations').

⁹¹ Tasmania Parliamentary Debates (vol 2) 243-244, (House of Assembly, 13th March, 1985).

Tasmania's unified system was designed to ensure the independence of the Small Claims Court, as well as enabling the system to operate efficiently and smoothly between various Court levels. Also, the adoption of the Small Claims Court into the existing Court structure enabled the Court to be established at a minimum of cost⁹² as well as enabling the Court to have the same accessibility to Courtrooms and buildings presently housing the Courts of Requests.

The Tasmanian legislation creates a Small Claims division of each of the thirty-seven Courts of Requests in Tasmania. In fact, however, there is only one full-time Magistrate (formerly 'Commissioner') for the entire State. Stationed in Hobart, he travels periodically to the other regional centres - Launceston in the North of the State, and Burnie/Devonport in the NW. Occasional trips also made to other localities, e.g. King Island and Sorrell. The Act also allows for the appointment of part-time Magistrates. For the most part, these part-time Magistrates have handled motor vehicle property damage cases. Finally, other Magistrates, who normally preside over the Court of Requests, have also assisted, again primarily in motor vehicle cases. The full time Magistrate is assisted by one Court clerk who works full time on Small Claims matters. The remaining administrative duties are carried out by existing staff of the Court of Requests. With the passage of the *Magistrates Amendment Act 1989*, both the Court of Requests and Small Claims Court became divisions of a newly formed Magistrate Court. The Small Claims Commissioner was also made a Magistrate.

The physical layout⁹³ of a Small Claims Court varies depending upon the locality. For example, Hobart has a hearing room specifically designed to facilitate the more informal procedure involved with Small Claims hearings. In contrast, in Burnie and Launceston Small Claims cases are heard in the same Court in which more formal adversarial proceedings occur, with little or no accommodation made for the more informal nature of Small Claims hearings.

3.5.3. Jurisdiction of Small Claims Division

⁹² Other than the employment of one full time Magistrate and a full-time clerk, and one room especially designed for small claims, the system utilises the resources which already existed to handle the Court of Requests.

⁹³ The physical layout of Small Claims Courts in Tasmania is discussed in more detail in Chapter 6, section 8.

The Magistrate has jurisdiction to hear all small claims filed with the Small Claims Registry itself⁹⁴, as well as any small claim transferred from the Court of Requests.⁹⁵ The definition of 'small claim' is contained in s 3 which provides:

"small claim" means any of the following claims: -

- (a) a claim arising out of a contract, including a claim arising out of a lease or tenancy agreement in respect of any premises leased or let to the lessee or tenant for residential purposes;
- (b) a claim in respect of a quasi-contractual obligation;
- (c) a claim for a declaration that a person is not liable to another person in respect of a claim or demand for the payment of an amount arising out of contract or in respect of a quasi-contractual obligation;
- (d) a claim in tort for damage to property;
- (e) a claim in tort for damages in detinue or conversion, where the total amount of the claim does not exceed the prescribed sum including, where a claim is made for an order to perform work to rectify a defect in goods or a deficiency in services, the value of the work sought to be performed, but does not include a claim for a debt or a liquidated demand where there is no dispute as to the liability for payment of the debt or demand, either in whole or in part.

Importantly, as pointed out in s 3 of the Act, the definition of 'small claim' requires that there be a dispute over the claim. In other words the Small Claims Court is not available for mere collection of a debt.

Further, the Magistrate has jurisdiction over any set-off, or counterclaim, which the respondent may assert against the claimant.⁹⁶ The set-off or counterclaim, however, may only be claimed up to the prescribed sum (\$2000) unless the Magistrate, in his discretion, decides to hear the claim,⁹⁷ or both parties consent in writing.⁹⁸ While the special Small Claims procedure is available for any small claim as defined, a claimant

⁹⁴ *Magistrates Court (Small Claims Division) Act* 1989 (Tas) (hereinafter 'Small Claims Act'), s 10(1)(a).

⁹⁵ *Magistrates Court (Small Claims Division) Act* 1989 (Tas), s 10(1)(b).

⁹⁶ *Magistrates Court (Small Claims Division) Act* 1989 (Tas), s 10(1)(c).

⁹⁷ *Magistrates Court (Small Claims Division) Act* 1989 (Tas), s 10(5).

⁹⁸ *Magistrates Court (Small Claims Division) Act* 1989 (Tas), s 10(1)(d).

may nevertheless elect to file an action in the Court of Requests.⁹⁹ However, the Act further provides that an election in writing may be made by either party to have an action, originally filed in the Court of Requests, transferred to the Small Claims division.¹⁰⁰

3.5.4 Filing of the Claim; Notice of Hearing; Deposit with Registrar; Summons

An action begins by filing a claim.¹⁰¹ This can be done in person at the Small Claims Registry or a claim form may be posted in the mail. Importantly, the Tasmanian legislation requires the Registrar and/or his staff to give assistance to a person who seeks help in completing the prescribed claim form to initiate an action in the Small Claims Court.¹⁰² During the period under study, the filing fee was \$20.¹⁰³ In addition to the filing fee, where the claim involves the supply of goods or provision of services for which no or only part payment has been made, the Magistrate may require the claimant to pay a deposit with the Registrar.¹⁰⁴

Upon filing of a claim, the registry must, as soon as practicable, 'cause a notice containing particulars of the claim to be served on the respondent and on every person who appears from the claim form to have a sufficient interest in the settlement of the dispute to which the claim relates'.¹⁰⁵ Also, notice of any defence, set-off, or counterclaim may have to be given to the other parties involved.¹⁰⁶

A claim having been filed, s 15(2) provides that the Registrar 'having regard to the convenience of the claimant and respondent, shall arrange a time and place for the

⁹⁹ *Magistrates Court (Small Claims Division) Act* 1989 (Tas), s 10(3).

¹⁰⁰ *Magistrates Court (Small Claims Division) Act* 1989 (Tas), s 14. An election made by one of the parties must be filed with the Registrar within the period of 14 days after the notice of defence is given, but can be filed at any time if in writing and by all the parties to an action (See s. 14(2)(c) and (d)).

¹⁰¹ Note that there are two types of claim form: one for motor vehicle accidents and another for all other claims. See Regulation 4.

¹⁰² *Magistrates Court (Small Claims Division) Act* 1989 (Tas), s 12(3).

¹⁰³ *Small Claims Regulations*, Part 2, s 5.

¹⁰⁴ *Magistrate Court (Small Claims Division) Act* 1989, s 16(1).

¹⁰⁵ *Magistrates Court (Small Claims Division) Act* 1989 (Tas), s 15(1).

¹⁰⁶ *Small Claims Regulations*, Rule 6.

hearing and determination of the small claim'; and ensure that notice of the hearing be served on the claimant and respondent and every other person on whom the notice of claim has been served.

Service of process is arranged by the Court. The prescribed method for service of notice under the Act is provided for in s. 36:

(a) in the case of a person who is neither a body corporate nor a firm -

(i) by delivering it to him personally;

(ii) by leaving it at that person's place of residence last known to the person required or authorized to serve the notice or other document with someone who apparently resides there, or at that person's place of business or employment last known to the person required or authorized to serve the notice of other document with someone who is apparently employed there, being in either case a person who has or apparently has attained the age of 16 years; or

(iii) by sending it by post to that person's place of residence, business or employment last known to the person required or authorized to serve the notice or other document;

(b) in the case of a body corporate -

(i) by delivering it to the secretary of the body corporate personally;

(ii) by leaving it at the registered office of the body corporate or at the place or principal place of business of the body corporate in Tasmania with the person apparently employed there, being a person who has or apparently has attained the age of 16 years; or

(iii) by sending it by post to the registered office of the body corporate or to the place or principal place of business of the body corporate; or

- (c) in the case of a firm -
 - (i) by delivering it to a member of the firm personally;
 - (ii) by leaving it at the place or principal place of business of the firm in Tasmania last known to the person required or authorized to serve the notice or other document with a person apparently employed there, being a person who has or apparently has attained the age of 16 years; or
 - (iii) by sending it by post to the place or principal place of business of the firm in Tasmania last known to the person required or authorized to serve the notice or other document.

3.5.5 Joinder

Section 17 (2) provides that:

A Magistrate, on his own motion or on the application of one of the parties to a proceeding before the magistrate, may in his discretion, join a person as a party to the proceedings if the magistrate is satisfied that that person has a sufficient interest in the settlement of the dispute to which the small claim in question relates.

It is under this section that insurance companies are allowed to participate with the insured in claims involving motor vehicle accidents.

3.5.6 Functions of the Magistrate

The Tasmanian Act provides:

8(1) The primary function of a magistrate sitting in the small claims division is to attempt to bring the parties to a dispute that involves a small claim to a settlement acceptable to all the parties.

(2) Where it appears to a magistrate to be impossible in a particular dispute involving a small claim to achieve a settlement acceptable to all the parties to the dispute, then, subject to section 24 (1) (a), the function of the magistrate is, after hearing and determining the

issues in dispute, to make an order with respect to that issue or, if he thinks the case so requires, an order dismissing the small claim.¹⁰⁷

3.5.7 Consent Orders, Registrar's Conference

Consent orders are provided for in s 29:

- (1) Where a settlement is made . . . a magistrate shall make an order that gives effect to the terms of the settlement.
- (2) A magistrate may --
 - (a) on the written application of all the parties to a proceeding before him; and
 - (b) after considering the issues involved in the proceeding and being satisfied that the parties properly understand those issues, make a consent order with respect to that proceeding.

The statutory regulations also empower the Registrar or his or her delegate¹⁰⁸ to hold a conference between the parties for the purposes of:

- (a) defining and limiting the matters in dispute; and
- (b) ensuring that the parties are taking all measures necessary for the hearing of the claim to take place expeditiously; and
- (c) assessing the time that is likely to be required for the hearing of the claim.¹⁰⁹

Seven days notice in relation to the conference must be given to the parties, unless they agree to a shorter time.¹¹⁰ Further, 'if, during a conference, the Registrar believes that there is a reasonable possibility of settling a small claim by conciliation,

¹⁰⁷ *Magistrates Court (Small Claims Division) Act* 1989 (Tas), s 8. This section refers to S. 24(1) (a) which is discussed below. It provides that the magistrate is not bound by the formal rules of evidence and may inform himself any matter in any manner he thinks fit.

¹⁰⁸ *Small Claims Regulations*, Rule 14.

¹⁰⁹ *Small Claims Regulations*, Rule 7.

¹¹⁰ *Small Claims Regulations*, Rule 8.

the Registrar may seek to bring about an agreement between the parties.¹¹¹ At such conferences, the parties are entitled to representation to the same extent and in the same circumstances as if the hearing were before a Magistrate.¹¹² The Registrar is also empowered to hold a conference by telephone.¹¹³ Such an agreement has the same force as a consent order.¹¹⁴

3.5.8 Hearing and Determination of Small Claims

Generally, parties are expected to present their own case.¹¹⁵ However, incorporated bodies are allowed to appear through an officer or employee.¹¹⁶ Subject to the satisfaction of the Magistrate, representation by a person who is not a legal practitioner may be allowed, for example, if the party is illiterate or cannot speak English.¹¹⁷ An interpreter, of course, may also be utilised and is provided free of charge. Incorporated bodies are also allowed to appear by an 'agent'¹¹⁸ who may not necessarily be an officer or employee, but must have the power to bind the corporate body. Legal practitioners are normally excluded from participating unless the Magistrate is satisfied that the nature of the dispute requires it and the parties consent, or the Magistrate is satisfied that the unrepresented party will not be unfairly disadvantaged by such an appearance.¹¹⁹

Hearings are to be held in private;¹²⁰ however, all parties may agree to the hearing being conducted publicly.¹²¹ The Magistrate is not bound by the rules of evidence and

¹¹¹ *Small Claims Regulations*, Rule 9.

¹¹² *Small Claims Regulations*, Rule 10 and s. 22, *Magistrates Court (Small Claims Division) Act 1989* (Tas).

¹¹³ *Small Claims Regulations*, Rule 13.

¹¹⁴ *Magistrates Court (Small Claims Division) Act 1989* (Tas), s 29 (2).

¹¹⁵ *Magistrates Court (Small Claims Division) Act 1989* (Tas), s 22(1).

¹¹⁶ *Magistrates Court (Small Claims Division) Act 1989* (Tas), s 22(2)(a).

¹¹⁷ *Magistrates Court (Small Claims Division) Act 1989* (Tas), s 22(2)(b).

¹¹⁸ *Magistrates Court (Small Claims Division) Act 1989* (Tas), s 22(2)(a).

¹¹⁹ *Magistrates Court (Small Claims Division) Act 1989* (Tas), s 22(3).

¹²⁰ *Magistrates Court (Small Claims Division) Act 1989* (Tas), s 23(1).

¹²¹ *Magistrates Court (Small Claims Division) Act 1989* (Tas), s 23 (2).

may inform himself of any matter in any manner he deems fit.¹²² The Magistrate may also appoint, at the Crown's expense, a person to inquire and report on any question of fact arising in the proceeding.¹²³ However, he may give the report whatever weight he sees fit.¹²⁴ Evidence may be taken on oath or affirmation and may be given either orally or in writing.¹²⁵ Also, the Magistrate is entitled, subject to rights or claims of privilege, to require any person to appear before him to give evidence and produce such books, documents and things as specified in the notice of attendance.¹²⁶

The hearing is to be conducted with as much informality, as little technicality, and as expeditiously as possible, given the requirements of the Act and proper considerations of the issues.¹²⁷ No record is required to be kept of the evidence from the proceedings apart from the requirement that the Magistrate must make a summary of the facts in issue as determined and any order which is made.¹²⁸

Where one party does not appear, the Magistrate must decide the case on the basis of the evidence before him.¹²⁹ However, within 7 days after receiving notice of the decision, the absent party may apply for a rehearing.¹³⁰ A rehearing will be granted if the Magistrate considers it just and reasonable to do so.¹³¹ Special provision is also made for the Magistrate to have a question of law of general and public importance determined by the Supreme Court.¹³² Should that happen, the Magistrate is empowered to adjourn the proceeding before him, pending the receipt of the opinion of the Supreme Court on the matter.

¹²² *Magistrates Court (Small Claims Division) Act* 1989 (Tas), s 24(1)(a).

¹²³ *Magistrates Court (Small Claims Division) Act* 1989 (Tas), s 24(1)(b).

¹²⁴ *Magistrates Court (Small Claims Division) Act* 1989 (Tas), s 24(2).

¹²⁵ *Magistrates Court (Small Claims Division) Act* 1989 (Tas), s 25.

¹²⁶ *Magistrates Court (Small Claims Division) Act* 1989 (Tas), s 25.

¹²⁷ *Magistrates Court (Small Claims Division) Act* 1989 (Tas), s 24(1)(c).

¹²⁸ *Magistrates Court (Small Claims Division) Act* 1989 (Tas), s 25(4).

¹²⁹ *Magistrates Court (Small Claims Division) Act* 1989 (Tas), s 26(1).

¹³⁰ *Magistrates Court (Small Claims Division) Act* 1989 (Tas), s 26(2).

¹³¹ *Magistrates Court (Small Claims Division) Act* 1989 (Tas), s 26(2)(b).

¹³² *Magistrates Court (Small Claims Division) Act* 1989 (Tas), s 27.

Based upon the above features, s. 9 provides that:

- (1) The record of the small claims division in respect of a proceeding in that division consists of --
 - (a) the claim form filed under section 12(1) that relates to that proceeding or any document relating to that proceeding filed, issued, or given under the *Local Courts Act* 1896 that relates to a claim that, pursuant to section 14, is transferred to the small claims division for hearing and determination as a small claim;
 - (b) a summary of the facts of the issue in dispute in the relevant small claim as determined and recorded by the magistrate during the hearing of that small claim; and
 - (c) any order made by the magistrate in relation to that claim.
- (2) Notes made by a magistrate pursuant to section (25(4)(b) do not form part of the record of the small claims division.

As to the availability of Small Claims records, s. 9(3) provides:

- (3) The record of the small claims division in respect of a proceeding in that division --
 - (a) shall be open for inspection free of charge by a party to the proceeding and a person acting with the authority of the Attorney-General; and
 - (b) shall be available for production before a court or a judge for the purposes of any proceedings before the court or judge.

3.5.9 Contempt Powers.

The original Small Claims Act was amended in 1987 to give the then Special Commissioner summary powers regarding contempt of Court. This was deemed necessary given the sometimes heated exchanges which can occur in a Small Claims

setting. As the then Attorney General noted in response to a question regarding how often the Commissioner had to have a person dealt with for contempt:

I cannot give the member a precise number save to say that the special commissioner has firmly expressed the view that he would be able to conduct the proceedings in the Small Claims Division more effectively if he had the power to deal with a person summarily for contempt. This tribunal at times can make the worst question time in this House look like a tea party. Tempers become raised and at the moment the special commissioner is pretty much a toothless tiger. He cannot deal with a person in contempt contemporaneously. That is why the clause is here. The special commissioner feels he must have that power.¹³³

The subject of contempt powers is, however, left out of the new *Magistrates Court (Small Claims Division) Act* 1989 because the former Commissioner is, under the new Court organisation,¹³⁴ now a Magistrate and possesses contempt powers in that capacity.

3.5.10 Orders, Appeals, Enforcement.

The Small Claims Magistrate is empowered to make the following orders:

- (a) an order that requires a party to the proceeding to pay a sum of money not exceeding the prescribed sum to a person specified in the order;
- (b) an order that the claimant does not owe money to a person specified in the order;
- (c) an order that requires a party to the proceeding (other than the claimant) to perform work to rectify a defect in goods, or a deficiency in services, to which a small claim in the proceeding relates;

¹³³ J. Bennet, Committee Discussion of Court of Requests (Small Claims Division) Amendment Bill 1986, Tasmanian House of Assembly, Parliamentary Debates, Fortieth Parliament - Second Session 1987 (Hansard) (No., 3) at 627.

¹³⁴ *Magistrates Court Amendment Act* 1987, (Tas), s 3.

(d) an order that dismisses the small claim to which the proceeding relates;

(e) an order that requires a party to the proceeding (other than the claimant) to replace any goods to which the small claim in the proceeding relates, and such ancillary orders as may be necessary to give effect to the order or orders so made by the magistrate.¹³⁵

All orders of the Court are final. Though not generally available against the losing party, costs may be awarded in the case of a frivolous or vexatious claim.¹³⁶ In a case transferred from the Court of Requests, the Magistrate may also award costs incurred up to and including the commencement of the claim in Small Claims.¹³⁷

Generally, there is no right of appeal.¹³⁸ However, a judgment of the Small Claims division may be set aside if there was no jurisdiction to hear the claim, the Magistrate exceeded his jurisdiction in relation to the small claim in respect of which an order was made, or the party was denied natural justice.¹³⁹

Where a judgment is made ordering the payment of money, it is deemed to be an order of the Court of Requests and enforceable in the same way as such orders.¹⁴⁰

3.6 Research on Australian Small Claims Courts and Tribunals

3.6.1 Non-empirical Research

Because the development of Small Claims Courts or Tribunals in Australia is of comparatively recent origin, most of the literature and studies to date have provided descriptive commentary on, as opposed to empirical evaluation of, the respective

¹³⁵ *Magistrates Court (Small Claims Division) Act* 1989 (Tas), s 29(3).

¹³⁶ *Magistrates Court (Small Claims Division) Act* 1989 (Tas), s 28.

¹³⁷ *Magistrates Court (Small Claims Division) Act* 1989 (Tas), s 28(3).

¹³⁸ *Magistrates Court Amendment Act* 1987, (Tas), s 32(1).

¹³⁹ *Magistrates Court (Small Claims Division) Act* 1989 (Tas), s 32(2).

¹⁴⁰ *Magistrates Court (Small Claims Division) Act* 1989 (Tas), s 29(8).

Court or Tribunal.¹⁴¹ Illustrative of this descriptive research are papers or articles by Latimer,¹⁴² Guild,¹⁴³ Goldring,¹⁴⁴ Lindgren,¹⁴⁵ Mitchell¹⁴⁶ and Forrest.¹⁴⁷ This research has focused upon the rules adopted by various jurisdictions, most often aspects of jurisdiction and the presence or absence of lawyers in Small Claims.¹⁴⁸ Other articles¹⁴⁹ have provided personal accounts of the author's Small Claims Tribunal experience. Still other studies¹⁵⁰ have compared interstate and overseas experiences with handling small claims.

Two of the most comprehensive descriptive examinations of Small Claims Tribunals concerned the Victorian Small Claims Tribunal. In 1975, Turner¹⁵¹ examined a wide range of procedural aspects including legal representation, statutory definition of a small claim, jurisdiction, degree of privacy afforded in the hearing, qualifications of Referees, types of order made by the Small Claims Tribunal and possible conflict of

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- 141 See e.g., N. Bates, *Introduction to Legal Studies* (3rd edn, 1980) (Sydney, Butterworths); J. Folino, 'Small Claims Tribunals' in *Advising the Consumer* (1979) (Melbourne, Leo Cussen Institute for Continuing Legal Education) pp. 75-94; J. Folino et al., *The Small Claims Tribunal* (1978) (Melbourne, Leo Cussen Institute for Continuing Legal Education); J. Turner, 'The Victorian Small Claims Tribunal' (1975) 2 *Monash University L. R.* 125.
 - 142 Latimer (1990), *op. cit.* 492.
 - 143 W. Guild, 'Jurisdiction and Natural Justice Under the Consumer Claims Tribunal Act 1974 (N.S.W.)' (1974) 12(1) *Australian Bus. L. R.* 51.
 - 144 J. Goldring, 'Small Claims Tribunals in Australia' (1976) *Legal Services Bulletin* 2 (part 1) and 50 (part 2).
 - 145 K. Lindgren, 'Solicitors and the Consumer Claims Tribunals of New South Wales' (1980) 8(1) *Australian Bus. L.R.* 48; K. Lindgren, 'Solicitors and Consumer Claims in New South Wales' (1981) 9(4) *Australian Bus. L.R.* 268.
 - 146 D. Mitchell, 'Concurrent Jurisdiction of Courts and Consumer Claims Tribunals in New South Wales' (1982) 10(3) *Australian Bus. L.R.* 280.
 - 147 J. Forrest, 'Consumer Redress Mechanisms', Unpublished LLM thesis, University of Melbourne, 1977.
 - 148 See e.g., Law Institute Council, 'Council Opposes Increased role for Tribunals', (1989) 57 *Law Institute Journal* 53.
 - 149 R. Evans, 'Confessions of a Small Claimant' (1978) 3 *Legal S.B.* 132; P. Latimer, 'Confessions of Another Small Claimant' (1979) 4 *Legal S.B.* 7.
 - 150 See e.g., R. Thomas, 'A Code of Procedure for Small Claims: A Response to the Demand for Do-it-yourself Litigation' (1982) 1 *Civil Justice Quarterly* 52; Australian Consumers' Association, 'Consumer in Law: Little People, Small Claims, Big Results' (1980) *Choice* April, 98, 127; E. Ellinger, 'Small Claims Tribunals' (1977) 5(2) *Australian Bus. L. R.* 121; J. Goldring, 'Small Claims Tribunals in Australia, Part I' (1976) 2 *Legal S. B.* 2.
 - 151 Turner, *op. cit.* 124-25.

law questions. Similarly, in the early 1980s, Robbins¹⁵² suggested a number of reforms to the Victorian model, many of which have been adopted by the Victorian Civil Justice Committee Report.¹⁵³

3.6.2 Empirical Research on Small Claims in Australia

While a number of writers have addressed the topic of Small Claims Courts and Tribunals, deVaus and others¹⁵⁴ point out there have been very few empirical studies evaluating small claim Courts or Tribunals:

One thing that is lacking in most of the literature is empirical research or even awareness of the need for empirical research. Empirical studies of how effectively Small Claim Tribunals work, the extent to which they fulfil their original aims, their usage patterns, the satisfaction of users and the patters of outcomes are almost completely absent from the Australian literature.¹⁵⁵

DeVaus conducted a comprehensive empirical study of the Small Claims Tribunal in Victoria as part of a disputes project designed to 'assess the adequacy of various dispute handling mechanisms and processes in Victoria.'¹⁵⁶ He surveyed all claimants who had lodged a claim in the Small Claims Tribunal between September 1983 and August 1984. Over Seventy percent replied (N = 1670) making it one of the largest samples employed in any country.¹⁵⁷ DeVaus concluded: (1) the Small Claims Tribunal was generally successful in achieving its aims of providing a mechanism for resolving small claims with relative speed and informality; (2) it had improved access to the more disadvantaged sectors of the community; (3) consumer satisfaction with the Small Claims Tribunal was high; (4) there was no evidence that

152 A. Robbins, 'Small Claims: Can We Improve the System? Part 1' (1982) 7 *Legal S.B.* 280; A. Robbins, 'Small Claims: Can We Improve the System? Part 2' (1983) 8 *Legal S.B.* 29.

153 Civil Justice Committee, 'Report to the Hon. Attorney-General Concerning the Administration of Civil Justice in Victoria, Vol 1' (1984) (Melbourne: Government Printer).

154 Goldring, Maher and McKeough (1987), *op. cit.* 396.

155 D. deVaus, 'The Small Claims Tribunal in Victoria: An Empirical Study', Report for the Ministry of Consumer Affairs, July, 1986, at. 23.

156 *Ibid* 30-31.

157 *Ibid* 127-128.

the social background of the party had any effect on the likelihood of their prevailing in the Small Claims Tribunal.¹⁵⁸

Among deVaus' recommendations for reform were: (1) the need to obtain more help for people for whom English was a second language; (2) more attention devoted to problems of enforcement of Small Claims Tribunal orders; (3) claimants needed to be more aware of what to do at the hearing; and (4) some facets of the SCT procedure required examination, most notably the policy of leaving traders and consumers alone in a room to negotiate. Importantly, it was specifically recommended that, because of its wide support, restrictions on legal representation should remain.¹⁵⁹

Finally, deVaus called for further research in a number of areas: (1) studies of people who do not use the Small Claims Tribunal (2) comparison with other institutions, such as Neighbourhood Justice Centres, which also resolve small disputes; (3) comparison of satisfaction levels of Small Claims Tribunal claimants with claimants before Magistrates Courts; (4) a study of the community's general awareness level of the Small Claims Tribunal; (5) a study of traders who go to the Small Claims Tribunal; and (6) a comparative study of a system like Victoria's in which legal representation is not allowed with that of South Australia's in which legal representation is permitted.¹⁶⁰

In NSW, Ramsay¹⁶¹ conducted an empirical study of several Small Claims Tribunals in order to determine the extent to which the Tribunals were being utilised by different socio-economic groups. Ramsay found that economic and educational background had a significant impact on access to the Small Claims Tribunal. Moreover, disputants from lower socio-economic backgrounds were in most need of consumer education about small claims.¹⁶² He concluded that:

People with low socio-economic backgrounds have problems
with lack of formal education or access to information

¹⁵⁸ *Ibid* 127-128.

¹⁵⁹ *Ibid* 127-128.

¹⁶⁰ *Ibid* 119-128.

¹⁶¹ R. Ramsay, 'The NSW Consumer Claims Tribunals: Access to Justice' (1987) *Legal Services Bulletin* 145.

¹⁶² *Ibid* 148.

sources. These factors make them the ones most adversely affected when education and community information services are cut.¹⁶³

Most recently, Ingleby¹⁶⁴ conducted a participant observation study of the Victorian Small Claims Tribunal, Order 24 Conferences in the Family Court and mediation in the Family Court. In the process of examining a wide range of alternative dispute resolution issues, Ingleby particularly explored the policy issues inherent in the relationship of alternative dispute resolution mechanisms and the Courts.¹⁶⁵ Among the concerns which Ingleby raises are: 1) should settlement conferences become mandatory? 2) if so, should parties be forced to come to them prepared? 3) will there be a requirement that parties negotiate in good faith? 4) if so, how will this be enforced? 5) should legal representation be allowed? 6) how can such a compulsory procedure win the approval of the local legal profession; 7) how can one ensure that the third-party neutral who conducts the negotiation has the requisite subject matter expertise and ADR process competence? 8) how does one minimise the danger of compulsion in a mandatory mediation context?; 9) given that not all cases are suitable for mediation, how does one discriminate those which should go through the process and those which are unsuitable?; and 10) given the complexity of these issues and the necessity of 'rules' to work them out, do the alleged cost and time efficiencies attributed to such a process become illusory?¹⁶⁶ Ingleby's powerful critique points to considerable tension which often exists between the goals of alternative dispute resolution agencies and those of Courts.

3.7 Conclusion

This chapter has described the nature of Small Claims Courts and Tribunals in Australia generally and in Tasmania in particular. Also discussed were the previous Australian studies which sought to evaluate and recommend needed reforms in the procedures to resolve small claims disputes.

¹⁶³ *Ibid.*

¹⁶⁴ R. Ingleby, *In the Ball Park: Alternative Dispute Resolution and the Courts* (1991) (South Carlton, Victoria, Australian Institute of Judicial Administration).

¹⁶⁵ *Ibid* 101-104.

¹⁶⁶ *Ibid*

As described above, Tasmania has chosen to handle small claims through the vehicle of a Court as opposed to a Tribunal, as in Victoria, NSW and Western Australia. Many features of the Tasmanian legislation - the emphasis on settlement, the absence of formal rules of evidence, the ban on lawyers and private hearing - all reflect a system which is more informal than traditional Courts. However, the Tasmanian Small Claims Court in other respects, retains many features commonly associated with traditional Courts. The jurisdiction of the Court is open to corporations as well as consumers, the adjudicator is legally qualified and bound to apply the law, some rules of evidence normally apply, parties are permitted to cross-examine each other, most hearings are one-time events, and Court orders have the same effect and are enforced in the same way as other Court judgments.

The only prior major empirical study of Small Claims in Australia has been that of de Vaus' concerning the Victorian Small Claims Tribunal. Accordingly, an empirical investigation of an Australian Small Claims Court, as opposed to a Tribunal, should be of particular interest. However, before turning specifically to the evaluation of the Tasmanian system, Chapter 4 examines the emerging themes and issues which have guided the evaluation methodology employed for this present study of the Tasmanian Small Claims Court.

Chapter 4

Central Themes and Emerging Issues in Small Claims Research

4.1 Introduction

As noted above, each of the Australian States and Territories has adopted its own solution to remedy the financial, structural, psychological, and procedural barriers commonly found in a traditional adversary system which had become increasingly unsuitable for handling small claims. These solutions reflect the moral, social, economic and political circumstances of the particular jurisdiction. Also, the Australian approach to handling small claims differs in significant ways from the approach taken in England, Europe, North America and Asia. Nevertheless, there are common problems and features of Small Claims dispute resolution systems which emerge from the experience of countries which have struggled to reform their legal systems in an attempt to forge a judicial machinery capable of adequately handling small claims.

This last part of the literature survey on Small Claims Courts and Tribunals attempts to identify some of the recurrent themes and issues, emerging from the Small Claims literature, both in Australia and overseas. These themes have guided the methodology and analysis of the present study and I shall return to them again in my conclusion to place the Tasmanian Small Claims Court Study within the broader framework of Small Claims research generally. Broadly, these themes fall into three categories. The first category concerns contextual issues which seek to define how Small Claims Courts and Tribunals fit into a wider scheme of both formal and informal dispute resolution procedures. The second category of themes relates to 'nuts-and-bolts' issues which directly concern Small Claims Courts and Tribunals. Included among these issues are questions about delay, costs, degree of formality, whether lawyers should be involved, and the nature of the claimants who utilise Small Claims systems. The final category of themes considers the evaluation process itself: why should Small Claims Courts and Tribunals be concerned with evaluation, what purposes does it serve, and how should one go about it.

4.2 Contextual Issues Impacting Small Claims Courts and Tribunals

4.2.1 The Need to View Small Claims in the Wider Context of Dispute Resolution¹

As noted previously, the development of special Courts and Tribunals to handle small claims arose out of the perceived inability of the adversary system to handle disputes involving small amounts. For such disputes, formal methods of adjudication were too costly, technical and prolonged. Accordingly, most reforms concentrated on developing modified procedures which removed lawyers, involved minimum cost, and resolved matters speedily. In the last decade, however, the focus has shifted from reform of the Courts to looking for alternatives to Courts and Tribunals.² Proponents of the alternative dispute

¹ See generally, H. Astor and C. M. Chinkin, *Dispute Resolution in Australia* (1992) (Sydney, Butterworths).

² See generally, Victoria, *Attorney-General's Working Paper on Alternative Dispute Resolution Report* (Attorney-General's Department, Melbourne, June, 1990); J. Sanders, *Mediation Centres*, Unpublished Report to the Tasmanian Law Foundation, June, 1990; G. Pears, *Beyond Dispute: Alternative Dispute Resolution in Australia* (1989) (Edgecliff, NSW: Corporate Impacts Publications); R. J. MacCoun, et al, *Alternative Adjudication: An Evaluation of The New Jersey Automobile Arbitration Program*, R-3676, The Institute for Civil Justice, Santa Monica, CA, Rand Corporation, 1989; P. Dwight, 'Commercial Dispute Resolution in Australia: Some Trends and Misconceptions' (1989) 1 (1) *Bond Law Review* 1; M. J. Fulton, *Commercial Alternative Dispute Resolution* (1989) (Sydney: Law Book Company); Queensland Government, *Green Paper on Neighbourhood Mediation Centres* (1989) (Queensland Government Printer); Kressel, K. and Pruitt, D. G. (eds) *Mediation Research* (1989) (San Francisco, Jossey-Bass); M. Dewdney, *Alternative Dispute Resolution: Developments in Australia, the United States and the United Kingdom, 1986-1987* (1987) (School of community and Welfare Studies, Macarthur Institute of Higher Education; Fine, E. S. (ed) *ADR and the Courts: A Manual for Judges and Lawyers* (1987) (New York, CPR Legal Program, Butterworths); Vermont Law School Dispute Resolution Project, *The Role of Mediation in Divorce Proceedings - A Comparative Perspective (United States, Canada and Great Britain)* (Vermont Law School, Vermont, 1987); Attorney-General's Department, *Dispute Resolution in Commercial Matters* (1986) Papers of the Colloquium of the Australian Academy of Science (Canberra: Australian Government Printing Office); C. Brennan, 'Radical Changes to Speed Commercial Cases' (1986) 60 *Law Institute Journal* 12; C. Croft, 'International Commercial Arbitration Comes to Town' (1985) 59 *Law Institute Journal* 799; K. Ford, 'Dispute Resolution Starts at the Australian Commercial Disputes Centre' (1986) 24 *Law Society Journal* 62; L. Nader, 'Disputing Without the Force of Law' (1979) 88 *Yale Law Journal* 998. L. Street, 'An Alternative for Dispute Resolution--Setting up the Australian Commercial Disputes Centre' (1986) 24 *Law Society Journal* 20; F. Sander, 'Alternative Dispute Resolution Movement: An Overview' (1985) 37 (no 1) *University of Florida Law Review* 1; J. Folberg and A. Taylor, *Mediation* (1984) (San Francisco: Jossey-Bass); . For some US empirical studies on ADR's see J. W. Adler, et al, *Simple Justice: How Litigants Fare in the Pittsburgh Court Arbitration Program*, R-3071, The Institute for Civil Justice, Santa

resolution movement argue that conciliation, mediation, arbitration and other forms of ADR's are often better suited than the adversary system, to the resolution of many disputes, especially minor individual and many commercial ones.³ Moreover, the trend of reform has not been solely away from the Courts and towards ADR's; Courts themselves have begun to utilise various forms of arbitration, conciliation and mediation.⁴

It must be acknowledged at the outset, that the discussion about the relevant advantages of ADR's vis-a-vis formal litigation has often been obstructed by a failure to reach a consensus about basic definitions. For example, the word 'alternative' is in many respects misleading because most Court systems themselves employ some form of negotiation, conciliation or mediation. Also, because the vast majority of cases never get to trial, it is inaccurate to suggest that ADR methods are an 'alternative' to litigation. Similarly, it is ludicrous to compare a cohort of cases which have been resolved via ADR with a cohort of cases which have gone to trial. For this reason, commentators such as Australia's Sir Laurence Street⁵ have preferred the term 'Additional Dispute

Monica, CA, Rand Corporation, 1983; D. L. Bryant, *Judicial Arbitration in California: An Update*, N-2909, The Institute for Civil Justice, Santa Monica, CA, Rand Corporation, 1983; R. F. Cook, J. A. Roehl, and D. I. Sheppard, 'Neighborhood Justice Centers Field Test: Final Evaluation Report' (1980) (Washington D.C., Government Printing Office); P. A. Ebener, and D. R. Betancourt, *Court-Annexed Arbitration: The National Picture*, N-2257, The Institute for Civil Justice, Santa Monica, CA, Rand Corporation, 1985; D. R. Hensler, *Reforming the Civil Litigation Process: How Court Arbitration Can Help*, P-7027, The Institute for Civil Justice, Santa Monica, CA, Rand Corporation, 1984; D. R. Hensler, and J. W. Adler, *Court-Administered Arbitration: An Alternative for Consumer Dispute Resolution*, N-1965, The Institute for Civil Justice, Santa Monica, CA, Rand Corporation, 1983.

- 3 Just how strident has been some of the criticism of the adversary system is exemplified by Auerbach: "[L]itigation has become an inevitable stage in the life cycle--slightly beyond adolescence but before maturity. It is virtually impossible to survive litigation and remain solvent, but it is occasionally possible to endure it and remain sane. As a modern ordeal by torture, litigation excels: it is exorbitantly expensive, agonisingly slow and exquisitely designed to avoid any resemblance to fairness or justice. Yet, in strange and devious ways, it does settle disputes--to everyone's dissatisfaction.' J. S. Auerbach, 'Welcome to Litigation' (17, January 1981,) *New Republic* 19, cited by Fulton, *op. cit.* 23.
- 4 See Dwight, *op. cit.* 15. For example, in Australia, a 1987 Practice Direction in the Queensland Supreme Court provides for court-ordered mediation in commercial cases. A system of voluntary mediation also exists in the Victorian County Court Rules. See also R. Thornton, 'Court-Annexed Arbitration: Kentucky's Viable Alternative to Litigation' (1989) 77 *Kentucky Law Journal* 881; J. de Jersey, 'Alternative Dispute Resolution (ADR): Mere Gimmickry?' (1989) 63 *ALJ* 69.
- 5 Sir Laurence Street, 'The Language of Alternative Dispute Resolution' (April 1992) 66 *ALJ* 194.

Resolution'.⁶ Regardless of the term employed, the rapid growth of ADR developments, coupled with the conceptual difficulties which exist even on a definitional level, highlight the need for further research into those elements of Small Claims Courts and Tribunals which incorporate conciliation, mediation, arbitration and related approaches to dispute resolution. More importantly, such issues raise fundamental questions regarding the purpose of Small Claims Courts and Tribunals. Does the underlying philosophy of a Small Claims system reflect a public goal of making Courts more accessible to the ordinary citizen; a political and economic strategy which strives to redress the power imbalance between consumers and traders? Or, is the system concerned primarily with providing a means for private individuals to resolve disputes? What is the nature of the relationship between formal dispute resolution, via the Courts, and informal dispute resolution via negotiation and conciliation? These questions call for serious reflection, on micro and macro levels, of the roles of Small Claims Courts and ADR's in the legal system specifically and in society in general.⁷

The ADR debate has undoubtedly shifted the emphasis on much Small Claims research and will continue to do so. However, the ADR movement itself has evolved from an initial stage of euphoria extolling its successes and virtues, to a 'second wave'⁸ of more critical reflection, which echoes a more conservative and cautionary refrain.⁹ Indeed, Matthews¹⁰ suggests that the ADR movement

⁶ *Ibid* 194.

⁷ See S. Henry, *Private Justice: Towards Integrated Theorising in the Sociology of Law* (1983) (London, Routledge & Kegan Paul); T. Eckhoff, 'The Mediator, the Judge and the Administrator in Conflict Resolution' (1966) 10 *Acta Sociologica* 148-172; R. Abel, 'Conservative Conflict and the Reproduction of Capitalism: The Role of Informal Justice,' (1981) 9 *International Journal of the Sociology of Law* 245-267. See generally, E. Kamenka and A.E.S. Tay (eds) *Law and Social Control* (1980) (London, Edward Arnold); H. Kelsen, *General Theory of Law and State* (1945) (Cambridge, Mass, Harvard University Press); A. Giddens, *Central Problems in Social Theory: Action, Structure and Contradiction in Social Analysis* (1979) (London, Macmillan).

⁸ R. Matthews (ed) *Informal Justice* (1988) (London, Sage) 1. Matthews suggests that the ADR movement is in fact in the 'third wave'

⁹ See generally, R. Ingleby, 'Why Not Toss a Coin? Issues of Quality and Efficiency in Alternative Dispute Resolution', Paper presented to the Australian Institute of Judicial Administration Ninth Annual Conference, Melbourne, 18-19 August, 1990; P. Dwight, 'Commercial Dispute Resolution in Australia: Some Trends and Misconceptions' (1989) 1; J. O'Hara, 'The New Jersey Alternative Procedure for Dispute Resolution Act: Vanguard of a 'Better Way'?' (1988) 136 *University of Pennsylvania Law Review* 1723. The writer is also indebted to Professor Christine Chinkin, then at the University of Sydney for an excellent seminar on ADR's presented to the Law Faculty, University of Tasmania on Friday 20 September 1991. See generally, Astor and Chinkin *op. cit.*

is now in its 'third wave', having lifted itself up from the pessimism of the critical period to a more optimistic, though not idealistic, appraisal of the benefits of alternative dispute resolution mechanisms. Among the broad concerns are first, whether an unchecked growth of ADR's will undermine the traditional role of the judiciary and Courts in society. Second, there is a fear that ADR's may act to promote efficiency at the expense of more vital values, ie fairness and justice.¹¹ Accordingly, ADR is criticised for emphasising means over ends.¹² Third, even on efficiency grounds, it has not been firmly established that ADR's necessarily are more efficient in regard to either time¹³ or cost¹⁴ savings, nor do they necessarily reduce Court backlogs¹⁵ or promote community development by reducing tensions and conflict within the

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- 10 R. Matthews, (ed) *Informal Justice* (London, Sage) 1.
- 11 Dwight, *op. cit.* 9 (Dwight points out that this criticism assumes all litigants do receive equality under the adversary system which is not true. To this extent, some may indeed be better protected under ADR, at 29).
- 12 Dwight, *ibid* 28; O'Hara, *op. cit.* 1732; A. Edwards, 'Alternative Dispute Resolution: Panacea or Anathema?' (1986) 99 *Harvard Law Review* 668 ('... the [ADR] movement is ill-defined and the motives of some ADR adherents are questionable. It appears that some people have joined the ADR band wagon without regard to its purposes or consequences, because they see it as a fast (and sometimes interesting) way to make buck').
- 13 Many studies have found that ADR's, in comparison to traditional litigation, decreased the time for dispute resolution. See e.g., Rolph and Hensler 'Court-Ordered Arbitration: The California Experience' (1984) *Civil Justice Quarterly* 63; S. Kritzer and P. Anderson, 'The Arbitration Alternative: A Comparative Analysis of Case Processing Time, Disposition Mode and Cost in the American Arbitration Association and the Courts,' (1983) 8 *Justice System Journal* 6, 14; M. Planet, 'Reducing Case Delay and the Costs of Civil Litigation Project', (1985) 37 *Rutgers Law Review* 285-7. However, other studies were either inclusive or concluded that ADR's increased the time for dispute resolution (e.g. A. Rosenberg, *The Pre-trial Conference and Effective Justice* (1964) (New York, Columbia).
- 14 A major problem with costs is the difficulty of measuring them. Indeed, some costs, such as psychological costs, are incapable of quantification. See R. Ingleby, *op. cit.* 59-60 (previous studies split fairly evenly on the potential cost savings in alternative dispute resolution proceedings' (at 60). Also, cost savings to the disputants might result in greater expenditures from the public purse. J. Lee, 'The American Courts as Public Goods: Who Should Pay the Costs of Litigation', (1985) 34 *Catholic Law Review* 267.
- 15 See e.g., R. Tomasic, 'Mediation as an Alternative to Adjudication: Rhetoric and Reality in the Neighborhood Justice Movement' in R. Tomasic and M. M Feeley (eds) , *Neighborhood Justice: Assessment of an Emerging Idea* (1982) (New York, Longman) at 239; J. A. Roel, and R. F. Cook, 'Issues in Mediation: Rhetoric and Reality Revisited' (1985) 41 *Journal of Social Issues* 161, 167; R. Posner, 'The Summary Jury Trial and Other Methods of Dispute Resolution: some Cautionary Observations' (1986) 53 *University of Chicago Law Review* 366 ('we should keep in mind that settling more cases may make litigation more attractive to other disputants by reducing the waiting period for trial.' (at 382).

community.¹⁶ Giving Judges and Registrars greater responsibilities for organising ADR's also consumes resources and may not lead to a speedier resolution of the dispute. A fourth criticism, advanced by Abel¹⁷ and others,¹⁸ is that the growth of ADR's might lead to two systems of justice: one for the poor and the other for wealthy disputants, most notably corporate interests.¹⁹ Fifth, Abel²⁰ and Hofrichter²¹ also note that to the extent ADR's are utilised for the resolution of disputes previously handled privately and without the benefit of Courts, there is also an increased intrusion of the state into the lives of its citizenry.²² Seventh, another aspect of the power relationships reflected by the growth of ADR's has been raised by some feminists,²³ environmentalists and

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- 16 See J. A. Roel, and R. F. Cook, (1982) in Tomasic and Feeley (eds) *op. cit.* 107; R. Ingleby, *op. cit.* 61-62.
 - 17 See generally R. Abel, *The Politics of Informal Justice*, Vol I: *The American Experience* (1982) (New York, Academic Press).
 - 18 A. Delgado et al, 'Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution' (1985) 6 *Wisconsin Law Review* 1359, 1402; Stuart, *Private Justice op. cit.* 45; Dwight, *op. cit.* 27..
 - 19 M. Galanter 'Why the Haves Come Out Ahead: Speculation on the Limits of Legal Change,' (1974) 9 *Law and Society Review* 95; Delgado et al, 'Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution' (1985) 6 *Wisconsin Law Review* 1359, 1402; L. R. Singer, 'Nonjudicial Dispute Resolution: The Effects on Justice for the Poor' 13 (1979) *Clearinghouse Review* 569.
 - 20 Abel (1981) *op. cit.* 261 (While informal justice is supposed to be run by community members on behalf of the community, it is typically run by government).
 - 21 R. Hofrichter, *Neighborhood Justice In Capitalist Society: The Expansion of the Informal State* (1987) (New York, Greenwood Press) ('...[T]he latest phase of mostly government-sponsored neighborhood dispute resolution forums that handle interpersonal disputes are primarily institutions of state societal and political control (rather than dispute resolution.' at xiv). See also B. Santos, 'Law and Community: The changing Nature of State Power in Late Capitalism', in R. L. Abel, (ed) *The Politics of Informal Justice, Volume 1: The American Experience*. (1982) (New York, Academic Press) (ADR's represent an expansion of state power into areas of social life previously only rarely touched by the state).
 - 22 See L. Nader 'Dispute Resolution Forum - Where is Dispute Resolution Today? Where Will It be in the Year 2000?' (1985) (Virginia, National Institute for Dispute Resolution) at 5.
 - 23 See H. Astor, 'Feminist Issues in ADR' (Jan-Feb 1991) *Law Institute Journal* 69. See also C. Menkel-Meadow, 'Portia in a Different Voice: Speculations on a Woman's Lawyering Process,' (1985) 1 *Berkley Women's Law Journal* 39; J. Rifkin, 'Mediation From a Feminist Perspective: Promise and Problems,' (1984) 2 *Law and Inequality* 21; M. L. Leitch, 'The Politics of Compromise: A Feminist Perspective on Mediation' (1986/87) 14/15 *Mediation Quarterly* 163; C. B. Craver, 'The Impact of Gender on Clinical Negotiating Achievement' (1990) 6 *Ohio State Journal of Dispute Resolution* 1; T. Grillo, 'The Mediation Alternative: Process Damages for Women' (April 1991) 100 *Yale Law Journal* 1545.

civil rights advocates who argue that the relegation of family law matters²⁴ and consumer disputes to ADR's suggest that these groups are being marginalised and denied access to the formal Court system.²⁵ Also the 'laudable "disarmament" or peace-making philosophies of ADR have been abused by parties astute enough to manipulate the situation to their advantage.'²⁶ Eighth, another argument inherent in the power relationships which form the context of some ADR's is the fear that ADR can result in coercion to settle.²⁷ This is especially so in situations where a Magistrate or Referee, faced with a heavy case load is dealing with disputants who have no legal representation.²⁸ If the settlement is conducted by a Court officer, such as a Registrar, there is the worry that the situation will not be adequately supervised to ensure that justice and fairness are maintained.²⁹ Ninth, there is the worry that, in the absence of procedural safeguards, such as the right of appeal and formal rules of evidence, ADR's cannot adequately ensure fairness and will be prone to arbitrariness.³⁰

24 See generally, S. Charlesworth, J. N. Turner and L. Foreman, *Lawyers, Social Workers and Families* (1990) (Sydney, Federation Press); R. McKenzie (ed) *Exploring Family Mediation in Australia* (1989) (Sydney, ADRA).

25 B. Dunne, 'Community Justice Centres: A Critical Appraisal' (1985) *Legal Services Bulletin* 188, 191; A. Bottomley, 'What is Happening to Family Law? A Feminist Critique of Conciliation,' in C. Smart and J. Brophy (eds) *Women in Law* (1985) (London, Routledge and Kegan Paul).

26 Dwight *op. cit.* 25. See also B. Mayer, 'The Dynamics and Power of Mediation and Negotiation,' (1987) 16 *Mediation Quarterly* 75; R. Young, 'Neighbour Dispute Mediation: Theory and Practice', (October 1989) 8 *Civil Justice Quarterly* 319, 327 (the degree of participation in informal resolution programs varies with the amount of program coercion); M. Galanter, 'Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change' (1974) 8 *Law and Society Review* 97.

27 Ingleby, *op. cit.* 58-59; N. Vidmar, 'Assessing the Effects of Case Characteristics and Settlement Forum on Dispute Outcomes and Compliance (1987) 21 *Law and Society Review* 155, 162; N. Vidmar, 'An Assessment of Mediation in Small Claims Court' (1985) 41 *Journal of Social Issues* 127 C. A. McEwen and R. J. Mainau, 'Small Claims Mediation in Maine: An Empirical Assessment' (1981) 33 *Maine Law Review* 237, 268.

28 See Ingleby, *op. cit.* at 58-59. See also Tomasic and Freeley (eds) *Neighbourhood Justice: Assessment of an Emerging Idea* (1982) (NY: Longman). Similar issues have also been raised in regard to plea negotiation. See J. Baldwin and M. McConville, *Negotiated Justice: Pressures on Defendants to Plead Guilty* (1977) (London, Martin, Robertson).

29 R. Enslen, 'ADR: Another Acronym, or a Viable Alternative to the High Cost of Litigation and Crowded Court Docket? The Debate commences' (1988) *New Mexico Law Review* 1.

30 Dwight, *op. cit.* 29; A. Limbury, 'A Practitioner's View of ADR' (1990) (South Carlton, Australian Institute of Judicial Administration) 101, 116. See also, R. Hofrichter, *op. cit.* at xiv-xv ('The phenomenon [informal dispute resolution developments] is highly relevant for investigation as a major movement away from the rule of law and toward expanded state power.'). See generally, S. B. Goldberg, E. D.

Tenth, to the extent that ADR's are truly 'alternative' to the Court system there is the concern that Courts may lose their traditional supervisory role in public dispute resolution.³¹ Moreover, the growth of ADR's and Tribunals tend to blur the role of the Court as a 'guardian of principles which are essential to the maintenance of democracy and the rule of law.'³² Eleventh, because conciliation, mediation and arbitration are usually conducted in private, there is removed from the public sphere, the educational value which exists when a publicly proclaimed judgment is available for all to see and to use as a guide for future conduct.³³ Twelfth, it is argued that many of the claimed advantages of ADR's are premised upon a simplistic and sentimental view of the role of law in society.³⁴ Finally, many practical problems regarding ADR's remain. For example, what type of training and education should practitioners of alternative dispute resolution possess? Should they be accredited or registered?³⁵ What about problems of confidentiality, liability for negligent advice, and so on?

The purpose of raising these arguments, however, is not to deny that for some disputes in some contexts, there may be significant advantages in the use of ADR's in preference to traditional adversarial methods. The growth of ADR's may well live up to all the claims made for them by early proponents. Instead, these arguments point to the need for caution, critical appraisal and evaluation.³⁶ If Matthews³⁷ is correct the euphoria which accompanied early

Green & F.E.A. Sander, *Dispute Resolution* (1985) (Boston, Little Brown and Company)

- 31 G. Brennan, 'Safeguarding the Courts' *Australian Law News* (May, 1990), p. 7; Dwight, *op. cit.* 9
- 32 D. Malcolm, 'The State Judicial Power' (1991) 21(1) *University of Western Australia Law Review* 7, 33. Cf B. Gaze and M. Jones, *Law, Liberty and Australian Democracy* (1990) (Sydney, Law Book Company) ('There is a clear disparity between the implications of the widespread belief in Australian democracy, and the rights and liberties which are valued and protected by law. Australian law does not satisfactorily guarantee any of these; more often than not the abrogation of rights occurs through the legal process' (at 493).
- 33 O'Hara *op. cit.* 1743ff.
- 34 E. Kamenka and A. E. S. Tay, 'Socialism, Anarchism and Law' in E. Kamenka and A. E. S. Tay' *The Crises in Legal Ideals* (1978) (London, Edward Arnold).
- 35 See generally G. Mills, 'Accreditation of ADR Specialists' (Jan-Feb 1991) *Law Institute Journal* 57.
- 36 See O'Hara, *op. cit.* 1733 (there has been a critical absence of empirical evidence about the success or effect of ADR). See also H. Gamble, 'Alternative Dispute Resolution', Paper presented at the Fourteenth Australasian Law Reform Agencies Conference, Sydney, 1989 (Professor Gamble suggests the need for a joint undertaking of eight law reform commissions to study alternative dispute resolution).

ADR developments has been tempered with the reality that there is dearth of empirical evidence to justify many of the earlier claims made by ADR proponents.³⁸ At the theoretical level, too, much conceptualisation is required before we attain a truly 'integrated' or 'unified'³⁹ conceptual framework which adequately accounts for and integrates methods of formal and informal dispute resolution.⁴⁰ Accordingly, these issues are also relevant to the Small Claims Court and should be considered in an evaluation of a particular Small Claims system.

4.2.2 Small Claims within the Broader Context of Judicial Administration

Judicial Administration Movement

An evaluation of Small Claims Courts and Tribunals must also consider questions of judicial administration. Professor Sallmann notes that 'confusion often arises in discussions about Court management'⁴¹ and 'a common cause of the confusion is failure to specify the level of discussion involved.'⁴² Avoiding such confusion, let it be clear that the present discussion of judicial administration takes place on three levels: jurisprudential/political conceptualisations, management issues generally, and individual judicial officer management issues.

In a wider context, concerns about the costs of justice,⁴³ delays⁴⁴ and undue formality⁴⁵ have led many scholars⁴⁶ to examine the role of Courts in society as

37 Matthews, *op. cit.* 1.

38 See Posner, *op. cit.* 637; See also J. Tyler, 'The Quality of Dispute Resolution Procedures and Outcomes: Measurement Problems and Possibilities' (1989) 66 *Denver University Law Review* 419.

39 See J. Efron, 'Alternatives to Litigation: Factors in Choosing', (July 1989) 52(4) *Modern Law Review* 480; See generally Henry, *Private Justice op. cit.*; M. Galanter, 'Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change' (1974) 8 *Law and Society Review* 97.

40 See M. Franaszek, 'Justice and the Reduction of Litigation Cost: A Different Perspective' (1985) 37 *Rutgers Law Review* 337.

41 P. A. Sallmann, 'Musings on the Judicial Role in Court and Caseflow Management,' (February 1989) 63 *ALJ* 98, 99.

42 *Ibid.*

43 J. S. Kakalik, and R. L. Ros, *Costs of the Civil Justice System: Court Expenditures for Various Types of Civil Cases*, R-2985, The Institute for Civil Justice, Santa Monica, CA.

well as the question of how Courts should best be managed to fulfil these roles.⁴⁷ As Sallman⁴⁸ concludes:

In the case of courts, adoption of a systemic perspective operates at two major levels:

(i) to place courts in their appropriate context in the overall economic, political and social environment of the day; and

(ii) to stress that, on a narrower plane, the courts themselves are part of a complex and detailed series of networks involving judicial officers, court officials, government agencies, the legal profession, the police, prosecutors, welfare organisations and so on.

Sallman's emphasis on a philosophical, societal and contextual approach reflects, and no doubt is in part attributable to, similar developments in jurisprudence.⁴⁹ In recent times, critical legal scholars,⁵⁰ sociologists,⁵¹

44 See e.g., P.A. Ebener, *Court Efforts to Reduce Pretrial Delay: A National Inventory*, R-2732, The Institute for Civil Justice, Santa Monica, CA, Rand Corporation, 1981; see generally H. Zeisel, H. Kalven and B. Buchholz, *Delay in the Court* (1959) (Boston, Little, Brown & Co).

45 See e.g., J. Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, P-7272, The Institute for Civil Justice, Santa Monica, CA, Rand Corporation, 1987.

46 See eg, C. Barr, 'The Zuber Report: The Decline and Fall of Court Reform in Ontario', 1988 *Windsor Yearbook of Access to Justice* 105; J. Deschenes, *Masters in Their Own House* (1981) Ottawa, Canadian Judicial Council; S. Flanders, *Court Management and Case Management in US District Courts* (1976) (Washington D. C., Federal Judicial Center).

47 See P. A. Sallmann, 'Tilting at Windmills and Sacred Cows: A Commentary on the Coopers & Lybrand WD Scott Review of the New South Wales Court System: An Antidote to Mithradates' (1990) (South Carlton, Victoria, Australian Institute of Judicial Administration, Papers Presented at the Eighth Annual AIJA Seminar, 18,20 August, 1989) at 96; See also, J. Resnik, *Managerial Judges*, R-3002, The Institute for Civil Justice, Santa Monica, CA, Rand Corporation, 1982; see also, S. Flanders, *Case Management and Court Management in United States District Courts* (1977) (Washington, Federal Judicial Center); Ontario Law Reform Commission, *Report on the Administration of Ontario Courts* (1973) (Toronto, Ministry of the Attorney General).

48 Sallmann, (1990) *op. cit.* 96.

49 A jurisprudential analysis of the small claims court is beyond the scope of the present study, nevertheless it is important to at least briefly note the influence of these developments. R. Posner, *The Problems of Jurisprudence* (1990) (Cambridge, Mass, Harvard University Press); R. Pound, *Outlines of Lectures on Jurisprudence* (1943)

feminists,⁵² economists,⁵³ anthropologists⁵⁴ linguists⁵⁵ and literary critics,⁵⁶ to name a few, have proffered a more critical and contextual notion of law, which sees the study of law as inseparable from the nature and quality of the myriad relationships which form the fabric of an increasingly complex society. These perspectives have fostered the search for alternative explanations for the nature of law in society and challenged the autonomy of law as a system of discrete rules and principles. Unfortunately, however, this plethora of 'conceptual frameworks', each with its own methodology, questions and assumptions and 'drawn from very different sources' has produced 'little cumulative theoretical effect.'⁵⁷ Absent is an 'integrated' approach (assuming

(Cambridge, Mass, Harvard University Press); R. Pound, *Jurisprudence* (1959) (5 vols) (St Paul, Minn., West Publishing Co).

- 50 See e.g., R. Unger, *Knowledge and Politics* (1975) (New York, The Free Press) ; D. Kennedy, 'Form and Substance in Private Law adjudication' (1976) 89 *Harvard Law Review* 1685.
- 51 See e.g., R. Abel, *The Politics of Informal Justice* (1982) (New York: Academic Press); See generally, R. Pound, *Social Control Through Law* (1942) (New Haven, Yale University Press), T. Parsons, 'The Law and Social Control', in W. M. Evan (ed), *Law and Sociology* (1962) (Chicago, Free Press) 64-69; R. Tomasic, *The Sociology of Law* (1985) (London, Sage); J. M. Fitzgerald, 'Grievances, Disputes and Outcomes: A Comparison of Australia and the United States', (1983) 1 *Law in Context* 15-45; J. M. Fitzgerald, and R. Dickins, 'Disputing in Legal and Non-Legal Contexts: Some Questions for Sociologists of Law' (1980-1) 15 (3-4) *Law in Context* 681-706.
- 52 See e.g., R. West, 'Jurisprudence and Gender' (1988) 55 *University of Chicago Law Review* 1.
- 53 See e.g., R. Posner, *The Problems of Jurisprudence* (1990) (Cambridge, Mass, Harvard University Press), Chapter 12; B. L. Benson, *The Enterprise of Law: Justice Without the State* (1990) (San Francisco, Pacific Research Institute for Public Policy); W. M. Landes and R. A. Posner, 'Adjudication as a Private Good, (March, 1979) 8 *Journal of Legal Studies* 235; R. H. Mabry, H. H. Ulbrich, H. H. Macauley and M. T. Maloney, *An Economic Investigation of State and Local Judiciary Services* (1977) (Washington, DC: National Institute of Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration, Department of Justice).
- 54 See e.g., J. M. Conley and W. M. O'Barr, *Rules Versus Relationships* (1990) (Chicago, University of Chicago Press); P. Bohannon, 'Anthropology and the Law' in S. Tax (ed) *Horizons in Anthropology* (1964) (Chicago, Aldine). See generally S. Roberts, *Order and Dispute: An Introduction to Legal Anthropology* (1979) (Harmondsworth, Penguin); J. Starr, *Dispute and Settlement in Rural Turkey: An Ethnography of Law* (1978) (Leiden, E. J. Brill); J. Starr, 'Mediation: Anthropological Perspectives', (1982) 6 (3) *ALSA Forum* 221-62; I. Hamnett, (ed) *Social Anthropology and Law* (1977) (London, Academic Press); P. H Gulliver, *Disputes and Negotiations: A Cross-Cultural Perspective* (1979) (New York, Academic Press).
- 55 See e.g., B. S. Jackson, *Semiotics and Legal Theory* (1987) (London, Routledge and Kegal Paul).
- 56 See e.g., P. Gewirtz, 'Aeschylus' Law '(1988) 101 *Harvard Law Review* 1043.

such integration is possible) which incorporates both informal and formal conflict resolution.⁵⁸

Movement towards a Responsive Model for the Role of Courts in General and Small Claims Courts in Particular

Especially prominent in this reformulation of the law as it relates to the role of Courts has been the work of Cappelletti, discussed above, who advocates a more democratic conception of the judiciary as 'responsive to the needs of the consumers of law and government.'⁵⁹ One aspect of a more responsive model of the judiciary has been the establishment of Institutes of Judicial Administration in Australia and England and the National Center for State Courts in the United States.

Further support of the 'responsive model' comes from the social sciences. Hadley and Young suggest that the responsive model of social administration is still 'in the making'⁶⁰. It has its roots in philosophical pragmatism and the human relations tradition in industrial sociology and management which developed in the 1950s and 1960s.⁶¹ As Hadley and Young⁶² describe it, the responsive model:

is based on the belief that the most effective public service organisation must be synergic. In other words it must be so structured and managed that as far as possible it can harness the commitment and creativity of all its members and relate their interests to the promotion and goals of the organisation. In the same way, it seeks

57 R. Tomasic, (1985) *op. cit.* 57, citing H. Jacob, 'Courts as Organizations' in K.O. Boyum and L. Mather (eds) *Empirical Theories About Courts* (1983) (NY, Longman) at 191.

58 See generally S. Henry, *Private Justice: Towards Integrated Theorising in the Sociology of Law* (1983) (London, Routledge & Kegan Paul).

59 M. Cappelletti, *The Judicial Process in Comparative Perspective* (1989) (Oxford, Clarendon Press) 113.

60 R. Hadley and K. Young, *Creating a Responsive Public Service* (1990) (New York, Harvester Wheatsheaf) 18-19.

61 See e.g., C. Argyris, *Personality and Organisation* (1957) (New York, Harper and Row); D. McGregor, *The Human Side of Enterprise* (1960) (New York: McGraw-Hill); R. Likert, *The Human Organisation* (1967) (New York, McGraw-Hill).

62 Hadley and Young, *op. cit.* 19.

to work in collaboration with other agencies and users to produce services which citizens experience as enabling and empowering rather than dependency creating.

A philosophical and political consensus appears to be emerging that Courts should be more responsive. This is especially true of Small Claims Courts and Tribunals which tend to have far more intimate contact with disputant citizens, who are actively involved in the presentation of their own cases. But, how are Courts to go about this task? At what pace should reform proceed and at what cost?⁶³

Models of Court Management: Governance of Small Claims Courts and Tribunals

These questions lead to the second level of discussion, general Court management. The influence of Chicago School economics, privatisation and constraints on government resources, as well as a vast increase in the volume of litigation,⁶⁴ have led in recent years to an emphasis on efficiency,⁶⁵ accountability⁶⁶ and responsibility⁶⁷ which underscore the need for judges to adopt a more professional approach to judicial administration.⁶⁸ On a systems

63 See e.g., J. Resnik, *Managerial Judges* R-3002, Institute for Civil Justice, Santa Monica, CA, 1982. (This report suggests claims for reduced delays have been based more on anecdote than fact; and that one must realise that asking judges to assume more managerial roles also has its costs. Clearly, more research is necessary on this issue).

64 The Hon. Sir Anthony Mason, Chief Justice of the Australian High Court, 'Research to Improve Judicial Administration Through Institutes of Judicial Administration-the Australian Institute of Judicial Administration' (February 1991) 65 *ALJ* 78.

65 See e.g., *Report on a Review of the New South Wales Court System*, Coopers & Lybrand, WD Scott, May 1989.

66 See e.g., A. Barnard and G. Withers, *Financing the Australian Courts* (1989) (South Carlton, Victoria, Australian Institute of Judicial Administration); (this was the first major study of judicial finance in Australia and a model is offered by which courts can account for the public funds which enable them to operate).

67 See H. Gamble, 'The Responsiveness of the Legal System to Change' Plenary paper delivered to the 47th Annual ALTA Conference, Brisbane, 9-12 July 1992 (Professor Gamble traces the changing role of the judiciary from one in which court administration was left to the executive, to the role today in which 'the management of courts is regarded as a partnership between judge and administrator.' (at p. 4); see also, Justice McGarvie, 'Judicial Responsibility for the Operation of the Court System' (1989) 63 *ALJ* 79.

68 T. W. Church and P. A. Sallmann, 'Governing Australia's Courts' (1991) (Carlton South, Victoria, Australian Institute of Judicial Administration) at 66. See also, P. A. Sallman, 'Musings on the Judicial Role in Court and Caseflow Management' (February 1989) 63 *ALJ* 98 ('The court system is caught up in this public accountability maelstrom. Courts and the judiciary, in particular, are under increasing pressure to provide evidence of the way in which their work is carried out.') (at 98).

level, many countries⁶⁹ are in the process of re-examining the nature of Court governance in an attempt to design a system which will enable Courts to be more responsive to the increasing demands which society places upon them. This has necessitated a change in philosophy away from a belief that parties should be in charge of their own lawsuit and judges should assume the role of passive observer and neutral umpire.⁷⁰ In most cases this has involved the 'development of a partnership between the judiciary and the executive branch of government.'⁷¹ In Australia, for example, a recent study by Professors Church and Sallmann⁷² examined three models of Court governance in Australia. The 'traditional' model involves a general executive department (usually the Attorney General's office) which administers Courts at all levels. Some States, such as South Australia, have a 'separate executive department' devoted exclusively to Court administration. Finally, there is the 'federal' model, adopted by the Federal and Family Courts and the Administrative Appeals Tribunal, which gives each Court a substantial degree of administrative autonomy in regulating its own affairs.⁷³

As Court administration moves away from the traditional model to more federal models which devolve responsibility for administration, judges are being called upon to assume a more autonomous and active role in the governance of the judicial system,⁷⁴ a role for which their traditional legal training often leaves

69 See e.g., S. Flanders, *Court Management and Case Management in US District Courts*, (1976) Washington DC, Federal Judicial Center; W. Z. Eastey, 'The North American Experience: A Theorem on Judicial Administration', in *AIIA Seminar on Constitutional and Administrative Responsibilities for the Administration of Justice* (1986); F. M. Coffin, 'Judges and Legislators: A Prospectus for Joint Venture' in *Conference Summary Report*, Proceedings on a national conference on legislative--judicial relations held in Denver, Colorado in October 1989, National Center for State Courts; Report of the Royal Commission on Assizes and Quarter Sessions (1969) Cmnd 3691 (Beeching Report) (court reform in England and Wales).

70 R. Cranston, et al, *Delays & Efficiency in Civil Litigation* (1985) (Melbourne, Australian Institute of Judicial Administration) 169-171.

71 Report of the Civil Justice Committee Concerning the Administration of Civil Justice in Victoria, (Melbourne, Vic Govt Printer), Vol I, par 8.49, p 334. See also the two other volumes which form this report, I. R. Scott, *Preliminary Study* (1982); and J. R. Pullen, N. F. Young and S. J. Geddes, *Court Surveys and Studies 1978-1984* (1985); Sallman, (1990) *op. cit.* 102. For a discussion of similar issues in the UK see, *Civil Justice Review: Report of the Review Body on Civil Justice*, United Kingdom, 1988 Cmnd, Chapter 5, Judicial Administration.

72 W. Church and P. Sallmann, 'Governing Australia's Courts'(1991) (Carlton South Victoria, Australian Institute of Judicial Administration).

73 *Ibid* 1.

74 Justice McGarvie, 'Judicial Responsibility for the Operation of the Court System', *op. cit* 82.

them unprepared.⁷⁵ This call for greater Court autonomy will likely increase as Courts become more decentralised, though it must be noted that in Australia historical and cultural processes have resulted in a judicial system which has traditionally been much more centralised than the Court system in US states.⁷⁶ As Church and Sallmann point out this raises issues of both intra and inter-Court governance.⁷⁷ Intra-governance issues focus on a particular Court and such questions as whether to 'vest formal decision-making authority--in the chief judicial officer, in the judicial officers on a collegiate basis, or in a committee of judicial officers.'⁷⁸ Inter-Court governance issues concern the Court as a system comprised of several Courts at varying levels. Particularly relevant to Small Claims are problems associated with the often deep divisions which result from the fragmentation of Courts by jurisdictional levels.⁷⁹ As Church and Sallmann found:

We heard from the Magistrates' Courts, for example, a concern that a courts' commission or council chaired by a chief justice and perhaps dominated by judges might give short shrift to priorities of lower courts; in the Supreme Courts, we heard judges indicate that they would not support any new system in which judicial officers of "lower" courts had a say in matters affecting the Supreme Court.

These problems point to the need to determine which matters are best determined on a general level for the system as a whole and which are best left to the responsibility of individual Courts.⁸⁰ For Small Claims Courts especially, with their close involvement of disputants who conduct their own

⁷⁵ Gamble, *op. cit.*

⁷⁶ A. Castles, 'Closing Down Country Courts: Centralised Justice in Australia Compared to the United States' (September 1990) *ALJ* 583. Castles points out that despite some early models of decentralisation, the British officials showed a 'clear lack of understanding . . . of Australian conditions' (at 585). They mistakenly assumed that the model of judicial administration that worked reasonably well in England was equally suitable to the vastly different geographic conditions of Australia.

⁷⁷ Church and Sallmann, *op. cit.* 67.

⁷⁸ *Ibid.*

⁷⁹ *Ibid* 71.

⁸⁰ *Ibid* 74-75.

cases, there would appear to be many advantages gained by having decisions 'made by those closest to them, who are most directly involved with their implementation and consequences.'⁸¹

Church and Sallmann suggest that if Courts are to be more responsive and effective in their own governance then Courts must perceive themselves as a unified system:

The courts of individual states and territories, despite having different, but increasingly overlapping, jurisdictions have a great deal in common. They operate within a common legal culture, with fundamentally similar rules and procedures, the same legal profession, and use the same pool of financial and human resources. They share the centralised administrative staff located in the executive department responsible for managing the courts. Because the courts of a state are so inter-related, and make up a system (even if that system is sometimes not operating optimally), we would suggest that if state courts in Australia are to obtain some form of administrative autonomy, it should be granted to a court system, rather than a collection of individual courts.⁸²

The Individual Judicial Officer

The third level of judicial management concerns the role of the individual judicial officer.⁸³ The point to be stressed here is that within the broad framework of a particular model of judicial administration, individual judges will nevertheless have their own philosophy, views and attitudes towards Court management issues. Given the heavy case load of Small Claims Court Magistrates and Referees, their greater involvement with the public who represent themselves in such Courts and Tribunals, and the more inquisitorial role played by the Small Claims adjudicator, both at the settlement and hearing stages, there appears to be even more scope for individual judicial approaches

81 *Ibid* 74-75.

82 *Ibid* 71.

83 Sallman, (1989) , *op. cit.* 100.

and consequently an urgent need for an evaluation of how these differences affect the administration of justice at this level.

4.3 Issues Specific to Small Claims Courts and Tribunals

4.3.1 Court or Tribunal?

A fundamental issue involving Small Claims dispute resolution mechanisms concerns the type of judicial or legal structure which should be employed to handle small claims. A more conservative, and traditional approach has been to reform existing judicial procedures so that they are more conducive to resolution of small claims at a minimum of cost and by the parties themselves. It must also be recognised that some disputes are more suitable to resolution before a Tribunal than others.⁸⁴ The growth of administrative law and Tribunals has led a number of jurisdictions to establish a Small Claims procedure which is independent of the formal judicial system.⁸⁵ This dual system, it is argued, ensures the independence of Small Claims procedures from the pressures towards formality and complexity which have afflicted the formal Court system. Such independence has also enabled the Small Claims system to be more responsive and attentive to the consumers who use it. A Tribunal whose only function is providing a mechanism for redressing small claims is preferred to an integrated system where Small Claims procedures are regarded as 'inferior' to more formal Court procedures. The panel members of a Tribunal also usually possess expert knowledge on particular subjects which thus enables them to specialise in a way in which Courts cannot.⁸⁶ Finally, the existence of various Tribunals provides an alternative, a rich diversity from which consumers may choose.⁸⁷

84 For example, disputes between neighbours are such that most commentators suggest that the conventional court system may not be able to provide an effective solution. See New South Wales Law Reform Commission, 'Neighbour and Neighbour Relations' (Discussion Paper 22, 1991) at 58-59.

85 For example, Victoria established a small claims tribunal, administered by the Ministry of Consumer Affairs, which has been operating since 1973. For an excellent discussion of the arguments in the court vs tribunal debate see D. DeVaus, *Small Claims in Victoria: An Empirical Study*, (1987) A Report Prepared for the Ministry of consumer Affairs, Victoria, 10-23.

86 For a good summary of the advantages and disadvantages of tribunals see J. G. Starke, 'Current Topics: Victorian Supreme Court's Concern Over the Development of Specialist Tribunals' (1990) 64 *Australian Law Journal* 385-387.

87 DeVaus (1986), *op. cit.* 10-23.

The trend towards the establishment of Tribunals and away from Courts is, however, not without its critics. Professor Tony Duggan⁸⁸, reviewing the trend towards the establishment of specific Tribunals to deal with consumer claims observed:

While there is undoubtedly an important role to be played by court-substitutes in certain areas, a wholesale drift away from the courts would have a number of obviously undesirable consequences. First, the evolution is foreseeable of two separate systems of justice: an expensive (hence perceptively superior) system for the institutional litigant and a cheap (perceptively inferior) system for individual and small claimants. As an end solution to the problems of accessibility, such a result would be not only untidy, but divisive.

Secondly, it is conceivable that as the trend gathers momentum, legislatures would come to rely on the establishment of specialist tribunals as an ad hoc - and perhaps inappropriate - response to every new need that became apparent in dispute resolution. Furthermore as such institutions proliferate, it may become increasingly difficult for the individual to discover which has jurisdiction over his complaint. In this sense, too many grievance-solving mechanisms may be as bad as too few.

Thirdly, in the event that individual claimants are diverted from the courts, distortions may eventually become apparent in the common law. New principles will be shaped in the decision-making process to meet the needs of the litigants who appear before the courts, but which may be entirely inappropriate when applied to

⁸⁸ A. J. Duggan, 'Consumer Redress and the Legal System' in Duggan, A. J. and Darvall, L.W., (eds) *Consumer Protection Law and Theory* (1980) (Sydney, Law Book Co) 200, 219.

different kinds of dispute or to cases where the relationship between the litigants is other than that to which the courts are accustomed. To an appreciable extent, the common law of contract has already met that fate. These distortions would assume importance for individual claimants wherever the instrumentalities entrusted with their disputes were required (as are some of the State small claims tribunals) to apply existing principles of law.

Similar arguments in favour of a Small Claims procedure integrated as part of the Court system were advocated by the Victorian Civil Justice Committee in its *Report Concerning the Administration of Civil Justice in Victoria* (1984):

It is the view of the Committee that the existing "dual" system does not provide a suitable minor civil dispute resolution in Victoria. It maintains a considerable degree of fragmentation and permits forum shopping. This creates confusion in the mind of the public as to the appropriate forum for resolution of a dispute. The lack of formal linkage between the Courts and the Tribunals means that matters inappropriately commenced in the forum cannot be easily transferred to another. There is also a certain amount of duplication of effort which may waste resources.⁸⁹

Influenced by such arguments, the Committee recommended that Victoria's Small Claims Tribunals should be 'incorporated within the judicial branch and treated both constitutionally and organisationally as part of an identifiably

89 Civil Justice Committee, *Report Concerning the Administration of Civil Justice in Victoria* (1984) s. 6.33, cited in Goldring, Maher and McKeough (1988) *op. cit.* 396-398. Other reviews of the judicial system in Australia include: Australian Law Reform Commission, *Debt Recovery and Insolvency* (Report No 36, 1987); Courts Department of South Australia, *Report on Small Claims in South Australia*, 1985; Northern Territory Law Reform Committee, *Report on Local Courts Act* (Report No 9, 1983); Lord Chancellor's Department, Civil Justice Review, *General Issues* (Consultation Paper No 6, 1987); ___ *Small claims* (Consultation Paper No 2, 1986; ___ *Enforcement of Debt* (Consultation Paper No 4, 1987); Law Reform Commission of Western Australia, *Report on Local Courts: Jurisdiction, Procedures and Administration* (June 1988) Project No 16 Part I; Manitoba Law Reform Commission, *Report on the Structure of the Courts Part II: The Adjudication of Smaller Claims* (Report No 55, 1983).

separate branch of government capable of growth in the future.⁹⁰ In this way, the judicial branch would possess greater variety in its dispute resolution methods and the independence of Small Claims Tribunals could be assured.⁹¹

4.3.2 Jurisdiction of Small Claims Courts and Tribunals

Another fundamental issue taken up by researchers of Small Claims systems involves the types of dispute which are best suited to the domain of Small Claims Courts or Tribunals. For example, in Tasmania the present jurisdictional amount is limited to claims up to \$2000.⁹² Yet, in many other Australian States the amount has been increased to \$5000⁹³ or \$6000.⁹⁴ Should the Court or Tribunal's jurisdiction be geared to a formula so that it keeps up with inflation and the costs of living? And what about the types of claims which may be heard? Some Small Claims Courts or Tribunals, as noted above, limit Small Claims to actions by consumers against traders. Is this type of limitation appropriate for a smaller jurisdiction like Tasmania? Finally, should a particular jurisdiction choose to expand the dollar amount or subject matter jurisdiction of its Small Claims Court or Tribunal, one must also consider the impact of such change on case loads, Court resources, relationship to other Court levels, and so on.⁹⁵ These and related questions are context-bound and such factors as the size of the jurisdiction, availability of other forums, existing laws, economic, social and political climate will influence the

90 *Ibid.*

91 Civil Justice Committee, *Report Concerning the Administration of Civil Justice in Victoria* (1984) s. 6.33, s.6.34. Civil Justice Committee, *Preliminary Report Concerning the Administration of Civil Justice in Victoria* (1982).

92 *Magistrates Court (Small Claims Division) Act 1989*, s 3(1).

93 Victoria, Queensland and the Northern Territory.

94 New South Wales and Western Australia.

95 See e.g., Report, 'Recent Trends in New Small Claims Filings Analyzed in New NCSC Report' (May 1987) Vol 14, No 5 (Williamsburgh, Virginia, National Center for State Courts) (The docket over the past years in several states seems to be overflowing with small claims filings. This raises the important management question of whether such increases have been planned for or anticipated. A pattern seems to be emerging that the larger the increase in dollar amount jurisdiction, the greater the resultant increase in new filings. Four out of five states which increased their dollar amount by only \$500 saw a 1-4% increase in filings, whereas four out of five states which increased the jurisdictional amount by \$1000 or more experienced an increase of between 23% and 46% in the rate of claims. However, it is unclear how much this increase represents claims which would otherwise have been filed in higher courts, or whether it represents claims which otherwise would not have been filed at all, given the cost and time involved with non-small claims procedures).

particular approach taken. An evaluative study, however, will be instrumental in providing answers to these questions. If the average amount of claim is \$800, for example, and 80% of all cases involve claims less than \$1000, there would seem to be little justification for increasing the jurisdictional limit in Tasmania beyond \$2000.

4.3.3 Costs of justice

Another theme prominent in the Small Claims literature relates to the costs of justice. This issue has been the subject of recent discussion in Australia with the Senate Standing Committee on Legal and Constitutional Affairs' inquiry into the justice system as well as Trade Practices Commission discussions about the de-regulation of the legal profession.⁹⁶ The provision of greater access to the Courts by providing affordable justice has been a major driving force behind the establishment of special procedures or separate Tribunals to deal with small claims. Mr Justice McGarvie of the Victorian Supreme Court, echoing the concern of Roscoe Pound, recently concluded that 'It is apparent that many Courts today are unable to provide justice with dispatch and for a cost that makes it available to ordinary citizens.'⁹⁷

An evaluation of a system to handle small claims must take into account the extent to which the Small Claims procedure has addressed problems associated with the costs of justice and has made the Courts more accessible to ordinary citizens.

4.3.4 Delays

Closely aligned to the problem of the cost of justice is that of delay.⁹⁸ Public and official concern over delays in the Court system have been on the agenda

96 See 'The Cost of Justice', (February 1990) *Australia Law News* 12; Law Reform Commission of Victoria, Issues Paper: 'Access to the Law - The Cost of Litigation' (May 1990) (Melbourne, Victoria Government Printer); A. Goldsmith et al, 'Litigation Efficiency in Intermediate Courts: An Empirical Study' Paper delivered to the Ninth Annual Conference of Australian Institute of Judicial Administration, 18-19 August, 1990, Melbourne.

97 Mr Justice McGarvie, 'Judicial Responsibility for the Operation of the Court System', (1989) 63 *ALJ* 779.

98 See generally R. F. Cranston et al, *Delays and Efficiency in Civil Litigation* (1985) (Canberra: Australian Institute of Judicial Administration); J. R. Pullen, *Court Surveys and Studies 1978-1984* (1985) (Melbourne: Civil Justice Committee).

for some time, yet reforms have not quickly materialised.⁹⁹ As with costs, a major rationale underlying the establishment of Small Claims Courts/Tribunals has been the provision of speedy, as well as affordable, justice. An evaluation of Small Claims procedures should consider the time factors involved at various points in the progression of a normal case: the time between filing a claim and serving the defendant with notice of the claim; the time between notice of claim and setting a case for hearing; the length of time involved in the hearing; and the time required to enforce an order of the Court. Finally, beyond the issue of monitoring the amount of delay, attention should also be focused on the reasons for any delay and the implementation of strategies to improve the system.

4.3.5 Small Claims Are Not Necessarily Simple Claims

Turning to the nature of claims filed in Small Claims Courts and Tribunals, the research is clear that small claims are not necessarily simple claims.¹⁰⁰ Moreover, this complexity can occur at different levels: the legal nature of the claim, the factual details of the case or the characteristics of the particular disputants. As to the nature of the claim, Small Claims Courts are often dominated by consumer type issues which can be highly technical and require the adjudicator to negotiate a labyrinth of common law, statutory and administrative precedents and regulations. Complexity can also arise from the nature of the disputants, especially when parties become emotionally involved in their own cases which, in most cases, are being conducted by the disputants themselves. Finally, contractual matters are often factually complex, involving as they do, building disputes, complicated repairs, etc which are often difficult to comprehend without the requisite technical expertise.

99 J. B. Grossman, et al, 'Measuring the Pace of Civil Litigation in Federal and State Trial Courts', (1981) 65(2) *Judicature* 86-113 (the authors conclude that there is no uniform problem of delay; instead one must look to the differences between courts and their particular cultures.); T. Church, et al, *Justice Delayed: The Pace of Litigation in Urban Trial Courts* (1978) National Center for State Courts (Williamsburgh, Va).

100 C. R. Pagter, R. McCloskey and M. Reinis, 'The California Small Claims Court' (1964) 52 *California Law Review* 876, 889-890; B. Yngvesson and P. Hennessey, 'Small Claims, Complex Disputes: A Review of the Small Claims Literature' (1975) 9 *Law and Society Review* 219, 258-259.

4.3.6 Small Claims Courts for Whom?

Who Uses the Small Claims Courts or Tribunals?

A frequent criticism made by many Small Claims studies, especially earlier ones, is that the Court or Tribunal is dominated by business litigants¹⁰¹ who use it as a cheap means of debt collection.¹⁰² Indeed, some critics suggest that this reflects the traditional bias in the legal system in favour of upper class interests and against the lower socio-economic class members.¹⁰³ The argument is made that this business interest domination has a chilling-effect on individuals who are discouraged from using the Court or Tribunal.¹⁰⁴ The existence of Small Claims Courts and Tribunals also arguably encourages businesses to be more reckless in advancing credit.¹⁰⁵ Reacting to this criticism, some jurisdictions¹⁰⁶ have barred business litigants from using the system. An alternative approach, adopted in Tasmania and New Zealand, is to require that there be a legitimate 'dispute' over a claim; the use of Small Claims procedures to collect on a liquidated sum not in dispute is disallowed.¹⁰⁷

101 National Consumer Council, *Ordinary Justice: Legal Services and the Courts in England and Wales* (1989) (London, Her Majesty's Stationery Office) 290 ('[I]n England and Wales less than a third of small claims are brought by individuals. Similar or lower figures emerge from studies in Canada, America and Northern Ireland.).

102 See generally, D. Gould, Staff Studies No. 3. Prepared for the National Institute of Consumer Justice, Washington D. C., (1972) 100; Yngvesson and Hennessey, *op. cit.* 219.

103 See e.g., J. Griffith, *The Politics of the Judiciary* (1985) (3rd edn) (London, Fontana) (Griffith argues that the very narrow conservative background of the judiciary results in an approach by which judges further their own class interests while acting in the name of the public interest); see generally, Consumer Council, *Justice Out of Reach: A Case for Small Claims Courts* (1970) (London, HMSO).

104 C. J. Whelan, (ed) *Small Claims Courts: A Comparative Study* (1990) (Oxford, Clarendon Press) 212-213.

105 *Ibid* 213.

106 For example, in most Australian jurisdictions a person who is not a consumer is excluded from the small claims court or tribunal. A number of American states (e. g. New York) prevent businesses from using Small Claims. In other jurisdictions in the US (e.g. California and Texas) as well as in Tasmania, Australia, professional debt collectors are barred from using small claims procedures. See National Consumer Council (1989), *op. cit.* 289-90.

107 For example, s 3(1) of the Tasmanian legislation provides: 'Small claim . . . does not include a claim for a debt or a liquidated demand where there is no dispute as to the liability for payment of the debt or demand, either in whole or in part.'

In contrast to earlier studies, recent research regarding the use of Small Claims Courts and Tribunals by businesses is more cautionary.¹⁰⁸ Whelan¹⁰⁹ and others¹¹⁰ argue that heavy use of Small Claims by business does not conclusively establish that such use is at the expense of individual litigants. Indeed, historically, special procedures for handling Small Claims were specifically designed to provide simple, cheap and informal access to business plaintiffs with small claims. Moreover, if businesses are excluded from Small Claims, the only alternative is to bring such actions in more formal Courts, with the result that individuals, who are most often the defendants, are denied the cheaper, more informal and speedier resolution afforded by the Small Claims Court or Tribunal. To take one example, Northern Ireland¹¹¹ adopted a Small Claims procedure which is equally open to individual and business litigants. When the procedure was first introduced in 1978-80, individual plaintiffs comprised 22% of all claims. By 1984-85, they made up only 6% of all claims. This apparently negative development, however, is offset by the fact that the total number of claims over that same period had tripled. In his study of the Northern Ireland Small Claims system, Greer, however, concluded that there was no evidence of delay or other distortion in the process.¹¹² Thus, heavy use of the system by business does not necessarily mean that individuals are being denied access or that the system is malfunctioning. Weller and Ruhnka¹¹³ in the United States also found that while permitting collection agencies to utilise Small Claims Courts and Tribunals added significantly to the number of cases, there was no evidence that this resulted in a chilling effect on the use of the Court by individuals. Similar issues revolve around the use of Small Claims procedures by insurance companies.

108 See e.g., D. Greer, 'Small Claims in Northern Ireland'. In Whelan, (1990) *op. cit.* 133.

109 Whelan (1990), *op. cit.* 212-213.

110 S. E. Elwell and C. D. Carlson, 'The Iowa Small Claims Court: An Empirical Analysis' (1990) 75(2) *Iowa Law Review* 443; S. Weller, J. C. Ruhnka and J. A. Martin, 'In-Court Assistance to Small Claims Litigants' (1983) 7 *Civil Justice Quarterly* 62.

111 Greer, 'Small Claims in Northern Ireland' 134.

112 *Ibid.*

113 J. Ruhnka and S. Weller, *Small Claims Courts: A National Examination* (1978) (Williamsburgh, Virginia, National Centre for State Courts) 5-6.

An Overemphasis on Consumers Plaintiffs?

While Courts at all levels have in recent years become more consumer oriented, Weller and Ruhnka contend that the emphasis on one type of claimant -- the consumer -- is a departure from the original purpose of Small Claims Courts to provide everyone, businesses as well as individuals, a mechanism for the resolution of minor civil disputes.¹¹⁴ Indeed, as mentioned below, barring collection agencies from Small Claims can often have the undesirable result of forcing individual defendants to fend for themselves in a higher, more formal Court where they are unlikely to be able to afford legal representation.¹¹⁵

While consumer issues have been a prime focus of much of the Small Claims literature, recent studies suggest the interrelationship of Small Claims Courts and consumers has been overstated. Ramsay¹¹⁶ points out that Small Claims Courts are only one, and indeed one of the least utilised, of a multitude of dispute resolution mechanisms available to consumers. Similarly, Vidmar¹¹⁷ notes that the vast majority of problem solving occurs in negotiations between the consumer and the business person; and that the influence of Court norms and legal rules is minimal. These writers call for more study of the contextual dynamics of consumer groups, market forces, consumer characteristics and other factors which form the setting of which the Small Claims Court is but a part.¹¹⁸ This wider context of Small Claims Courts as one point along a continuum of available dispute resolution mechanisms is discussed more fully below.

114 S. Weller and J. Ruhnka, 'Small Claims Courts: Operations and Prospects' (1978) (Williamsburgh Virginia: National Center for State Courts).

115 *Ibid.*

116 I. Ramsay, 'Small Claims Courts in Canada'. In Whelan, (1990) *op. cit.* 37-38.

117 N. Vidmar, 'Seeking and Finding Justice? An Empirical Map of "Minor" Dispute Behavior in English Canada' (1987) *Osgood Hall Law Review* 72.

118 See e.g., Ministry of Consumer Affairs, *A Review of Conciliation Services and Recommendations For Client Servicing Improvements* (March 1991) (Victorian Ministry of Consumer Affairs, at 79-80 (evaluates the various conciliation services offered by Consumer Affairs and notes, among other objectives, that of consumer and trader education which aims to teach traders and consumers to manage their own problems).

Who are the Defendants in Small Claims Courts and Tribunals?

Small claims studies overseas have also examined the other side of the coin, the composition of defendants. If businesses, in many jurisdictions, are most frequently plaintiffs, the defendants tend to be individuals, a significant portion of whom do not contest the hearing.¹¹⁹ More disturbing still, studies have shown that in many of these cases, the defendant debtor would have had a good defence against the plaintiff business creditor.¹²⁰ Further, businesses tend to be repeat users of the system, thereby gaining some specialisation and expertise which may give them an advantage over the individual defendant appearing in the Court for the first time.

Participation by Insurance Companies

Another contentious issue prevalent in many Small Claims systems is the participation by insurance companies. In New Zealand, for example, Hawes¹²¹ points out that:

there have been many complaints from insurance companies, which allege that they have frequently been arbitrarily denied access to the Tribunals, or if permitted to appear, their rights are ignored by referees who display ignorance of insurance law, and a cavalier disregard for well-established contractual rights and obligations.

Further adding to the problem is uncertainty about whether or not insurance companies are 'parties' to the action, some Referees holding that they are; others that they are not.¹²² If insurance companies are allowed to participate some have expressed reservations about the use of already heavily burdened and under-resourced Small Claims Courts and Tribunals to resolve matters which should be sorted out by the insurance companies themselves. There is

119 See I Ramsay, *Debtors and Creditors: A Socio-Legal Perspective* (1986) (Abingdon: Professional Books); C. A. McEwen and R. J. Maiman, 'Small Claims Mediation in Maine: An Empirical Assessment' (1981) 33 *Maine Law Review* 237.

120 See M. Adler and E. Wozniak 'More and Less Coercive Ways of Settling Debts'. In H. M. Drucker and N. L. Drucker (eds) (1979) *The Scottish Government Yearbook 1980* (Edinburgh: Paul Harris).

121 C. Hawes, 'Insurers and Small Claims in New Zealand' (1989) 2(2) *Insurance Law Journal* 131, 134-135.

122 *Ibid* 134.

also the worry that unfairness can result if only one side is represented by an experienced insurance agent while the other party is not. In the insurance company's' defence, if the jurisdiction permits them legitimately to utilise the Court, why should they be singled out for criticism over other claimants?¹²³

4.3.7 Access Issues: Constraints which Prevent Maximum Use of Small Claims Courts and Tribunals

Physical Access to Small Claims Courts and Tribunals

Most Court buildings were built at a time when laissez-faire economics and attendant philosophies dominated the thinking of most judges and the average person seldom had any reason for contact with the law; and if they did, the matter was left to the professionals. The last few decades, however, have witnessed a consumer revolution in which people are more aware of their rights and insistent that they be recognised.¹²⁴ One aspect of this phenomenon is that legislatures and Courts have been under increasing pressure to be more responsive to a changing clientele who expect government to provide workable mechanisms for the resolution of their disputes.

Unfortunately the legal system has not always been responsive to these societal changes and the new demands placed upon them.¹²⁵ As Church recently stated:

Courts, to borrow an over-used term from the computer industry, are not "user friendly" institutions. It is not so much that they are intentionally impersonal or arrogant in their dealings with the public; rather, I suspect that today's courts have simply inherited a mind-set that had its origins in a judiciary of a different day. As a result, the tendency is to perpetuate a perspective on the relationship of courts to the citizenry that is ultimately damaging to the continuance of public support for our judicial system.

123 See *ibid* 131-133. The issues concerning use of small claims by insurance companies is covered in more depth in the Presentation and Analysis of Results, Chapter 6.

124 See generally J. Forrest, 'Consumer Redress Mechanisms', unpublished LLM thesis, University of Melbourne, 1977.

125 See R. Thomas, 'Civil Justice Review -- Treating Litigants as Consumers' (1990) 9 *Civil Justice Quarterly* 51-52.

Most courts in which I have spent any time are organized for the convenience of judges, of court staff, and of lawyers; usually in that order. If the convenience of the public is considered at all, it comes well behind these court-house "regulars". The implicit ranking of priorities is seldom examined, or even discussed.¹²⁶

Research into the best method of handling small claims is one of the few areas in which these implicit assumptions are being examined and challenged. Like their counterparts in public hospitals, universities, accounting firms and elsewhere, judicial administrators, researchers and policy makers are beginning to examine the physical layout of Courts,¹²⁷ the acoustics,¹²⁸ scheduling,¹²⁹ costs, degree of privacy,¹³⁰ availability of parking, child care, and other services in an effort to make the Court system more responsive to the consuming public -- the litigants who use it.¹³¹

Multi-culturalism: Use of Small Claims by Non-English Speaking Groups

Finally, there is the issue of multi-culturalism and Small Claims access for migrants.¹³² Those who cannot speak the national language fluently are less

126 T. W. Church, 'A Consumer's Perspective on the Courts' (1990) (Carlton South, Victoria, Australian Institute of Judicial Administration) 7.

127 National Consumer Council (1989), *op. cit.* 299-300 ('Arbitrations should not be held in large echoing court rooms where the sense of informality will be lost. Wherever possible, smaller offices or retiring rooms should be made available' at 299.)

128 *Ibid.*

129 A number of Small Claims Courts have experimented with evening or Saturday sessions. See generally, Ruhnka and Weller, *op. cit.* ; J. Frierson, 'Let's Abolish Small Claims' (Fall 1977) 16 *Judges Journal* 18; 19; Note, 'The Persecution and Intimidation of the Low-Income Litigant as Performed by the Small Claims Court in California', (1969) 21 *Stan. L. Rev.* 1657, 1671; National Consumer Council (1989), *op. cit.* 299-300 ('We strongly support the Civil Justice Review recommendation that evening hearings should be held on an experimental basis') at 299.

130 Most small claims hearings are in private. However, issues of accountability and the chance for prospective disputants to see a hearing before facing their own trial, would be an advantage. See National Consumer Council (1989), *op. cit.* 299.

131 Church, (1990), *op. cit.* 6-7.

132 See generally, Fisher, L. (ed), *Cultures Consequences in Dispute Resolution* (Proceedings of the Conference of 21-22 October 1988) (Surrey Hills, NSW, Alternative Dispute Resolution Association of Australia) (Among the recommendations which came from the conference were: the need for more research, greater financial support for specialist training in regard to multi-cultural issues, more

likely to make use of legal services. Moreover, people coming to Australia from other cultures may not understand the Australian legal system.¹³³ Given the multicultural reality of Australian society, it is important in any evaluation of Small Claims to determine the extent the Court or Tribunal is being utilised by various cultural groups. It is also necessary to examine such issues as the availability of interpreting services, public information and other features of the system which act to remove barriers to access.¹³⁴

Other Socio-Economic Factors

A person's class background, education, prior experience, as well as the language and professional mystique of the law no doubt play a role in erecting barriers, especially for the poor and those from a non-English speaking background.¹³⁵ Collectively, these issues suggest there is much we do not know regarding the socio-economic characteristics of claimants and defendants who utilise our Small Claims Courts and Tribunals. Moreover, such knowledge is crucial in order to determine the extent to which usage and satisfaction levels, success rates and other factors are influenced by the characteristics of claimants such as the past experience, education level, income, occupation, gender or age of the disputant.¹³⁶

Knowledge Constraints

Another aspect of access relates to disputant knowledge of Small Claims Courts and procedures.¹³⁷ Most studies of Small Claims Courts have recommended

consultation between government organisations and ethnic communities, more interpreter services, see J. Rieker, 'Concluding Overview' of the Conference, at 60-62).

¹³³ See M. Cass and R. Sackville, *Legal Needs of the Poor* (1975) (Australian Government Commission of Inquiry into Poverty: Law and Poverty Series) (Canberra, AGPS).

¹³⁴ See G. Bird, *The Process of Law in Australia: Intercultural Perspectives* (1988) (Sydney, Butterworths) Chapter 4, 'Courts and Tribunals: Access and Equity', 163-231; see also, Australian Law Reform Commission, 'Multiculturalism and the Law', (January, 1990). Issues Paper No 9.

¹³⁵ See R. Sackville, *Legal Aid in Australia* (1975) ((Australian Government Commission of Inquiry into Poverty: Law and Poverty Series, Canberra, AGPS); R. Sackville, *Law and Poverty in Australia* (1975) Australian Government Commission of Inquiry into Poverty: Law and Poverty Series, Canberra, AGPS); M. Sexton and L. Maher, *The Legal Mystique: The Role of Lawyers in Australian Society* (1982) (Sydney, Angus & Robertson).

¹³⁶ Whelan (1990), *op. cit.* 218; DeVaus (1986), *op. cit.* 49-58.

¹³⁷ See generally, M. Cappelletti and B. Garth, (eds) *Access to Justice: A World Survey* (1978)(Alphenasandenrijn, Sijthoff and Noordhoff) who note the link between access and people's competence to recognise that a legal problem exists.

the need for measures to increase the public's awareness of the Courts,¹³⁸ improve the informational materials available to disputants, eliminate the legal jargon from Court forms,¹³⁹ and better educate disputants how best to utilise Small Claims procedures.¹⁴⁰

Language Constraints

Even if consumers are aware of Small Claims Courts and their procedures, another barrier to access is the language of the law. Socio-linguists have pointed out that the language which we speak is often determined by a host of factors both personal (such as age, sex, education, occupation etc) and contextual (the setting in which we speak).¹⁴¹ Furthermore, researchers¹⁴²

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- 138 In addition to court produced publications, many private individuals and organisations have produced manuals to assist Small Claims disputants. See e.g., M. Coleman, *Using the Small Claims Court* (1990) (Sacramento, CA, California Department of Consumer Affairs); R. Theresa, *Small Claims Court* (rev. ed) (1990) (New York, Random House); D. Matthews, *Sue the Bastards* (1981) (NY, Arbor House); J. Morris, *You Can Win Big in Small Claims Court* (1981) (NY, Rawson, Wade Publishers); R. Spurrier, *Inexpensive Justice: Self-Representation in the Small Claims Court* 3rd edn (1983) (Millwood, NY, Associated Faculty Press); R. Warner, *Everybody's Guide to Small Claims Court* 9th edn (Nolo Press); M. A. Zuker, *Small Claims Court Practice in the Ontario Provincial Court (Civil Division)* (1989) (Toronto, Carswell); Law Society of Upper Canada, *Winning in Small Claims Court* (1990) (Toronto, Law Society of Upper Canada); D. S. Greer, *Small Claims in Northern Ireland: A "Step-by-step" Guide* (2nd edn) (1982) (Belfast, SLS Legal Publications); S. A. Strauss, *You in the Small Claims Court: A Practical Guide* (1985) (Cape Town, SA, Juta); M. Birks, *Small Claims in the County Court: How to Sue and Defend Actions without a Solicitor* (1973) (England, Her Majesty's Stationery Office).
- 139 National Consumer Council (1989), *op. cit.*; see generally, R. P. Wolfe, *Small Claims Courts: Records Management and Case Processing* (1980) (Williamsburgh, Va, National Center for State Courts).
- 140 Most small claims systems now publish booklets for disputants and some are required to do so by statute. See e.g., Haw. Rev. Stat s 633-36 (1985); Cal Civ Proc Code s 116(a) (Sup. 1989); NYC Civ Ct Act s 1803(b) (1987).
- 141 S. Berk-Seligson, *The Bilingual Courtroom* (1990) (Chicago, University of Chicago Press) 12-13.
- 142 See e.g., M. Atkinson and P. Drew, *Order in Court: The Organization of Verbal Behavior in Judicial Settings* (1979) (London, Macmillan); S. Berk-Seligson, *The Bilingual Courtroom* (1990) (Chicago, University of Chicago Press); B. Danet et al, 'An Ethnography of questioning'. In R. Shuy and A. Shnukal (eds) *Language Use and the Uses of languages: Papers from the Fifth Annual Colloquium on New Ways of Analyzing Variation in English* (1980) (Washington D.C., Georgetown University Press); B. Danet, "'Baby" or "Fetus"? Language and the Construction of Reality in a Manslaughter Trial' (1980) 32 *Semiotica* 187-219; B. Danet, *Speaking of Watergate: Language and Moral Accountability*, *Centrum* 135 (Working Papers of the Minnesota center for Advanced Studies in Language, Style, and Literary Theory (1976) 4; M. Brennan and R. Brennan, *Strange Language* (1988) (Riverina Murray Institute of Higher Education); D. Mellinkoff, *The Language of the Law*, (1963) (Boston, Little Brown & Co); D. Crystal and D. Davy, *Investigating English Style* (1969) (Harlow, Longman); V. Charrow & R. Charrow, 'Making Legal Language Understandable: A

have identified features of 'legalese' which distinguish the language of the law from standard English. Danet,¹⁴³ for example, describes nine lexical features of legal English, such as technical terms ('default'); and common terms with uncommon meaning ('assignment' meaning 'the transference of a right, interest or title,' rather than its general meaning, 'something assigned, a task or duty'); and unusual prepositional phrases ('in the event of default,' meaning 'if'). The syntactic features of legalese, the ways in which words are put together, are also strange to the uninitiated. Examples are: nominalisations, or the formation of nouns or noun phrases for verbs ('make assignment' in place of 'assign'); unusual anaphora in referring back to previously mentioned nouns by use of the same noun where standard English would require a pronoun); lengthy sentences; and a high frequency of prepositional phrases with unusual placement between the subject and predicate of a sentence; unique determiners (use of 'such' and 'said' preceding nouns and in places where standard English would employ 'this' or 'that' Finally, at the level of discourse, legal English tends to lack cohesion and 'is characterised by what would seem to be lists of sentences strung together, similar to the style of writing found in reading primers.'¹⁴⁴

Legal English is also overly compact. Each sentence contains a great deal of information, and this information is not restated afterward in a different manner to help the reader absorb it.¹⁴⁵ This is in marked contrast to ordinary written English, which strives to aid reader comprehension through rephrasing.¹⁴⁶ Not only is legal language more difficult to comprehend than standard English, there are also differences between spoken and written legal English, and in

Psycholinguistic Study of Jury Instructions', (1979) 79 *Columbia Law Review* 1306; E. Finegan and R. DiPietro (eds) *Form and Function in Testamentary Language in Linguistics and the Professions* (1982); D. Millinkoff, *Legal Writing: Sense and Nonsense* (1982) (St Paul, Minn, West Publishing Co); Law Reform Commission of Victoria, *Plain English and the Law* (Report No 9, 1987); Law Reform Commission of Victoria, *Access to the Law: The Structure and Format of Legislation* (Report No 33, 1990); Law Reform Commission of Victoria, 'Discussion Paper No 1: Legislation, Legal Rights and Plain English' (August, 1986).

143 B. Danet, 'Language in the Legal Process' (1980) 14 *Law and Society Review* 445, 474-481-564; see Brennan and Brennan, *op. cit* for an Australian example.

144 *Ibid*

145 *Ibid.*

146 *Ibid.*

turn, different levels or types of each.¹⁴⁷ For example O'Barr found four varieties of spoken legal language:

FORMAL LEGAL LANGUAGE: The variety of spoken language used in the court-room that most closely parallels written legal language; used by the judge in instructing the jury, passing judgment, and "speaking to the record"; used by lawyers when addressing the Court, making motions and requests, etc; linguistically characterised by lengthy sentences containing much professional jargon and employing a complex syntax.

STANDARD ENGLISH: the variety of spoken language typically used in the court-room by lawyers and most witnesses; generally labelled CORRECT English and closely paralleling that taught as the standard in American classrooms; characterised by a somewhat more formal lexicon and than that used in everyday speech.

COLLOQUIAL ENGLISH: a variety of language spoken by some witnesses and few lawyers in lieu of standard English; closer to everyday, ordinary English in lexicon and syntax; tends to lack many attributes of formality that characterize standard English; used by few lawyers as their particular style or brand of court-room demeanour.

SUBCULTURAL VARIETIES: Varieties of language spoken by segments of the society who differ in speech style and mannerisms from the larger community; in the case of the particular courts studied in North Carolina, these varieties include Black English and the dialect of English spoken by poorly educated whites.¹⁴⁸

¹⁴⁷ *Ibid.*

¹⁴⁸ W. M. O'Barr, *Linguistic Evidence: Language Power and Strategy in the Courtroom* (1982) (New York, Academic Press) at 25'; see also, W. M. O'Barr, 'The Language of the Law', in C.A. Ferguson and S. B. Heath (eds), *Language in the USA* (1981) (New York, Cambridge University Press).

Because some people are able to move up and down these various legal registers and others cannot, there are also issues of control and empowerment in the relationship of individuals with the legal system and between individuals opposing each other in a particular case.¹⁴⁹ These issues are discussed more fully below in the consideration of the degree of formality versus informality in Small Claims hearings. Finally, other reforms, such as grouped proceedings¹⁵⁰ or class actions and contingency fees¹⁵¹ have been recommended to enhance access to people otherwise discouraged from utilising the Court system to resolve their disputes.

4.3.8 Role of Lawyers/ Need for Legal Advice

One of the most contentious issues involving Small Claims is the extent to which lawyers are allowed, ¹⁵² limited¹⁵³ or totally excluded¹⁵⁴ from the

149 See generally, J. Conley and W.. O'Barr, *Rules Versus Relationships* (1990) (Chicago, University of Chicago Press).

150 The Australian Law Reform Commission has recommended the adoption of a limited form of class action. Also, s87(1)(B) of the *Trade Practices Act* 1974 (Cth) provides that the Trade Practices Commission may bring an application on behalf of consenting and identified consumers in the case of a breach of Part V of the Act. See generally, F. Galbally, 'Representative Actions, Joinder and the Potential for Grouped Proceedings' Consumer Law Seminar: The Trade Practices and and Fair Trading Legislation, General Practice Section of Law Council of Australia, 1991; W. Pengilly, 'Class Actions' (November, 1988) *Australian Law News* 16.

151 Contingency fees have been much mooted recently in both Australia and the UK. See e.g., J. Starke, 'Current Topics: Discussion Paper on Contingency Fees of the Senate Standing Committee on Legal and Constitutional Affairs, May 1991' 65 *ALJ* 438-440 ('. . .in January 1989, one of the three Green Papers issued by the Lord Chancellor, Lord Mackay, for the reform of the English system of justice, was devoted to contingency fees; just before this there had been a Report by the Working Party of the General Council of the English Bar . . .on the same subject; then by way of an answer to the Green Paper . . .Ch 24 of the General Council's response to all three Green Papers, Quality of Justice: The Bar's Response (1989) was devoted entirely to contingency fees; and lastly, in a Discussion Paper released by Mr Chris Sumner, Attorney-General for South Australia, on 25 October 1990, support was given to the introduction in that State of a controlled contingency fee system. . .Thus it was only natural that the Senate Standing Committee on Legal and Constitutional Affairs, inquiring into the cost of legal services and litigation. . .should thereunder explore, as part of its mandate, the whole subject of contingency fees, and this it has done in its Discussion Paper No 3, released in May 1991, following earlier release of Papers Nos 1 and 2, respectively entitled, *Introduction to the Issues* and *Lawyers' Fees*.' at 438).

152 See Note, 'The Persecution and Intimidation of the Low-income Litigant as Performed by the Small Claims Court in California' (1969) 21 *Stan. L. Rev.* 1657, at 1680 (lawyers necessary to guarantee equality between the parties).

153 See Ruhnka and Weller (1978), *op. cit.* 194 (should limit lawyer participation to evidentiary points at the end of trials); Joseph & Friedman, 'Consumer Redress Through the Small Claims Court: A Proposed Model Consumer Justice Act' (1977) 18 *BCL Rev.* 839, 867 (prohibiting lawyers from representing litigants, but allowing them to accompany clients to assist during the hearing); National Institute of Justice, U.S. Department of Justice, *Small Claims Court Reform* (1983) 3-4, at 11 (states have

system.¹⁵⁵ The rationale for limiting or excluding lawyers from the Small Claims Court is that lawyers unduly complicate,¹⁵⁶ add to the cost¹⁵⁷ of, and delay proceedings¹⁵⁸ -- all of which are contrary to the goals which Small Claims systems are designed to promote.¹⁵⁹ There is also the danger that 'when lawyers are present judges will play a much more passive role, deciding on the evidence presented, rather than asking questions and seeking the facts.'¹⁶⁰ Also, the litigant who cannot afford a lawyer is at a significant disadvantage if matched against a party with one. To the extent these factors deter people from utilising the system then access to justice is effectively denied.

Advocates of lawyer participation point to the role of lawyers in ensuring equality between the parties, promoting negotiation and settlement, and assisting the Court and parties on critical points of law and fact in complex cases.¹⁶¹ Ingleby¹⁶² argues further that, to the extent that legal representation

enacted laws to discourage lawyers from taking small claims cases); Whelan (1990), *op. cit.* 221, 222.

154 National Consumer Council (1989), *op. cit.* 291-293 ('Eight American states have prevented lawyers from appearing in small claims, as have Quebec and New Zealand. In New South Wales and South Australia lawyers can only appear with the agreement of the parties and if the tribunals are satisfied that this will not lead to an unfair advantage' (at 292). See also D. Gould, *supra* note, at 219 (allowing lawyers in small claims on balance runs counter to more small claims goals than it promotes); T. Klein, 'Buyer and Seller in the Small Claims Court' (1971) 36 *Consumer Rep* 624, 628 (simplified procedures demand that lawyers be excluded); Note, 'Small Claims Courts: An Overview and Recommendation' (1976) 9 *U. Mich J. L. Ref* 590, 604 (lawyers should not be allowed); Special Project, 'Judicial Reform at the Lowest Level: A Model Statute for Small Claims Courts' (1975) 28 *Vand L. Rev* 711, 791 (model statute prohibits lawyers from participating in small claims).

155 See J. S. Auerbach, *Justice Without Law? Resolving Disputes Without Lawyers*, (1983) (New York, Oxford University Press).

156 Gould, *op. cit.* 215 (lawyers lengthened the trial and added to the formality of proceedings).

157 A. Eovaldi and P. Meyers, 'The Pro Se Small Claims Court in Chicago: Justice for the "Little Guy"?' (1978) 72 *Nw. U.L. Rev* 947, at 987.

158 See e.g., Ruhnka and Weller (1978), *op. cit.* 193-194 (presence of lawyers lengthened the trial)

159 See e.g., Gould, *op. cit.* 215 (lawyers inevitably introduce legal formalities into a small claims trial); National Consumer Council (1989), *op. cit.* 292 ('The danger is that when lawyers are present judges will play a much more passive role, deciding on the evidence presented, rather than asking questions and seeking the facts.')

160 National Consumer Council (1989), *op. cit.* 292.

161 See generally, Gould, *op. cit.* 201-206; Elwell and Carlson, *op. cit.* 448-449.

decreases the amount of communication which the adjudicator must have with disputants and removes the adjudicator's concern about whether disputants are properly informed of their rights, then lawyer representation actually decreases the length and formality of the legal process. Middle ground positions seek to gain the advantages of representation, without the disadvantages, by placing emphasis on the inquisitorial role of the judge in Small Claims cases,¹⁶³ calling for Court provided or annexed legal advisers to assist inexperienced disputants,¹⁶⁴ and stressing litigant education via Court pamphlets and other information.¹⁶⁵ These suggestions in turn have their problems: Court staff are usually restricted in that they may provide legal information, but not legal advice, because they are not qualified to practice law;¹⁶⁶ some judges are ill-equipped to handle the inquisitorial role which the Small Claims Court demands of them¹⁶⁷; and many in-Court advice programs typically provide information and assistance from the viewpoint of the plaintiff or claimant, but not the defendant or respondent.¹⁶⁸ Ironically, despite the fact that Small Claims systems are often designed to make lawyers unnecessary, the reality is that a high percentage of people seek legal assistance.¹⁶⁹ However, most studies

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- 162 R. A. Ingleby, *In the Ball Park: Alternative Dispute Resolution and the Courts* (1991) (Carlton South, Institute of Judicial Administration) 32.
- 163 Note, 'The Persecution and Intimidation of the Low-income Litigant as Performed by the Small Claims Court in California', *op. cit.* 1665.
- 164 Ruhnka and Weller (1978), *op. cit.* 192-193.
- 165 See e.g., F. Caro, Institute for Social Welfare Research, *Small Claims Court Collection in New York City: Assessing the Impact of Reform Measures* 44, 49 (1984).
- 166 S. Weller and J. C. Ruhnka, 'Small Claims Courts: Operations and Prospects', Research Essay Series Number E006, (1978) (Williamsburgh, Virginia, National Center for State Courts) p. 6-7.
- 167 See Elwell and Carlson, *op. cit.* 447; W. DeJong, G. Gooklasian and D. McGillis, National Institute of Justice, U.S. Department of Justice, 'The Use of Mediation and Arbitration in Small Claims Disputes' (1983) at 2; Beresford, 'It Takes a Big Judge to Handle Small Claims' (Fall 1977) 16 *Judges J.* at 14-16; Note, 'The Persecution and Intimidation of the Low-income Litigant as Performed by the Small Claims Court in California' *op. cit.* 1668.
- 168 See e.g., T. Puckett, 'Credit Casualties: A Study of Wage Garnishment in Ontario' (1978) 28 *University of Toronto Law Journal* 95; see generally, McEwen and Maiman, *op. cit.*
- 169 See e.g., Ruhnka and Weller (1978) *op. cit.* 60 (34% of plaintiffs and 41% of defendants consulted an attorney); deVaus, *op. cit.* 89 (of those people who sought legal help beforehand, 60% stated it was their attorney who recommended small claims).

have found that legal representation makes little difference to the plaintiff's chance of winning.¹⁷⁰

Accordingly, some of the questions which an evaluation of Small Claims Courts must ask and seek to resolve are: 1) to what extent do litigants seek legal advice? 2) is this an advantage or disadvantage? 3) are some litigants (the educated, particular income or age groups, etc) more likely to seek legal advice than others?; 4) apart from going to a lawyer, what type of advice or information is available?; 5) is this information/advice adequate? 6) if lawyers are excluded from the hearing, how do those who need it, get legal advice?

4.3.9 Formality vs Informality: Rule of Law and Related Issues

Small claims Courts and Tribunals typically strive not only to be affordable and speedy, but also less formal and technical. This is especially true in contexts where legally untrained individuals are conducting their own case. The paradox surrounding this issue is that, while too much formality in a Small Claims setting may lead to an injustice, many traditional formalities, such as rights of appeal, public hearing, legal representation and rules of evidence, were established to promote justice and avoid injustices and promote the rule of law.¹⁷¹ Indeed, recent empirical research¹⁷² from the United States, probing the psychological costs of litigation on ordinary litigants, suggests that the critical factor is that the procedure employed must be perceived as fair and dignified, and this is true whether the procedures employed are formal or informal. For these reasons, Pound recognised that there is a 'continual movement in legal history back and forth between wide discretion and strict detailed rule, between justice without law, as it were, and justice according to

170 National Consumer Council (1989), *op. cit.* 292-93; . Ruhnka and Weller (1978), *op. cit.*; Touche Ross Management Consultants, *Study of The Small Claims Procedure*, produced for the Civil Justice Review, Lord Chancellor's Department, 1986.

171 See generally, S. Ratnapala, *Welfare State or Constitutional State* (1990) (Queensland, Centre for Independent Studies); G. de Q., Walker, *The Rule of Law: Foundations of Constitutional Democracy* (1988) (Melbourne, University of Melbourne Press).

172 See E. A. Lind et al, *The Perception of Justice: Tort Litigants' Views of Trials, Court-Annexed Arbitration, and Judicial Settlement Conferences*, R-3708, Institute of Civil Justice, Santa Monica, CA, Rand Corp, 1989; See also J. Thibaut and L. Walker, *Procedural Justice: A Psychological Analysis* (1975) (New York, John Wiley and sons); Cf R. M. Hayden and J. K. Anderson, 'On the Evaluation of Procedural systems in Laboratory Experiments: A Critique of Thibaut and Walker', (1979) (3) (1-2) *Law and Society Review* 21-38.

law'.¹⁷³ The Small Claims adjudicator is thus often torn between the need to formally apply an increasingly complex body of statutory law covering consumer and related type complaints, while at the same time giving due consideration to principles of 'fairness' or 'equity' according to some discretionary standard.¹⁷⁴ This tension is captured by Abel¹⁷⁵ who points out that informal institutions have their own inbuilt limitations:

From the viewpoint of the capitalist state, their drawback is that they cannot effectively manage conflict and remain informal. If they take the latter course they will atrophy. . .if they choose the former they will have to remain more openly coercive; but this will generate opposition and compel the liberal state to respond by adopting formal procedures. . . Members of oppressed groups. . .want to resist exploitation and domination, not reach an accommodation with it. They want a public hearing and moral vindication; if informal institutions do not provide this, grievants will find other arenas.

173 R. Pound, *An Introduction to the Philosophy of Law* (1954) (New Haven, Yale University Press) p. 54.

174 Whelan (1990), 230. See also E. Kamenka and A. E. S. Tay, 'Socialism, Anarchism and Law' in E. Kamenka and A. E. S. Tay, *The Crises in Legal Ideals* (1978) (London, Edward Arnold) (Kamenka and Tay criticise those who 'are much happier talking about "community" than about the state, about participation than administration and planning, about "self expression" than about emulation. there is a remarkable longing for the personalisation of law and legal proceedings, for the restoration of man to a place in the organic community that recognises him as a person, and that makes justice, at least in principle, the work of the whole community and not a specialised branch of learning and experience. There is a parallel enthusiasm for a "situational ethic" to replace general impersonal principles of conduct. . . people's courts and people's judges seem more human than the bewigged and begowned representatives of a complex and learned art, which still believes that men must be judged by universal principles grounded in and shaped by long-mulled over and carefully recorded experience and that hard cases make bad law. The sentimentality and superficiality of the new picture is reflected in its comparatively fleeting impact; it is always being undermined by concrete and *real* developments.' at 54-55); see also, A. Barak, *Judicial Discretion* (1989) (New Haven, Yale University Press) at 266 ('I hope the modern society will find its judges to be careful and reasonable, examining every question from all its angles; aware of their creative function; balancing objectively among the various interests; applying the fundamental principles neutrally; and seeking to attain a delicate balance between majority rule and the basic rights of the individual--a balance that represents the equation of the democratic regime.')

175 R. Abel, 'Conservative Conflict and the Reproduction of Capitalism: The Role of Informal Justice,' (1981) 9 *International Journal of the Sociology of Law* 245, at 263.

There is also the difficulty of balancing the need to do justice to the individual while at the same time achieving the goal of preserving public rules or standards of conduct so that the institution is accountable to the community as a whole. This point was made by Ratnapala,¹⁷⁶ writing of the Administrative Appeals Tribunal, but it is also applicable to Small Claims Courts and Tribunals:

Accountability to the individual alone means that the process fails to address one very important requirement of justice. It is that justice must be done not only in relation to the individual but also in relation to the community. This requirement applies whether one talks of commutative justice or distributive justice. In the case of commutative justice, it expresses the need to ensure that the established rules of conduct are upheld and their breaches remedied. In the case of distributive justice, the requirement translates as the need to assure that the benefits and privileges conferred from public wealth are distributed according to rules and criteria agreed to by the public.

O'Malley¹⁷⁷ and others¹⁷⁸ have also referred to this tension between 'technocratic justice'¹⁷⁹ and the rule of law:

In recent years it has been noted with increasing frequency that there are major contradictions emerging between the rule of law and certain regulatory and administrative demands of the interventionist state. In general, the rule of law is defined in such sociological writings as an ideological complex in which the central principle is that the state is subject to legal controls

176 Ratnapala, *op. cit.* 399, at 94; See also J. Resnik, *Due Process: A Public Dimension*, P-7418, The Institute for Civil Justice, Santa Monica, CA, Rand Corporation, (1982).

177 P. O'Malley, 'Technocratic Justice in Australia' (1984) 2 *Law in Context* 31.

178 W. Heydebrand, 'The Technocratic Administration of Justice' in Spitzer, S. (ed) *Research in Law and Sociology* Volume 2 (New York, JAI Press); H. Genn and Y. Genn, *The Effectiveness of Representation at Tribunals* (July 1989) (Lord Chancellor's Department).

179 O'Malley, *op. cit.*

which limit the arbitrary exercise of power. More specifically, such observers argue that the major threats to the rule of law stem from practices which erode, subvert or displace the array of procedures and forms which act as checks on state power - in particular due process, but also such ancillary arrangements as the jury trial, adversary justice and the dominance of the judiciary.¹⁸⁰

As to the cause of this tension O'Malley offers the following analysis.

In broad terms this collision between the rule of law and state interventionism may be attributed to two principal pressures for changes in the administration of justice. First, there are pressures which arise from the expanded volume of state administration and regulation and from fiscal difficulties to which this has contributed within state budgets. Such pressures appear in the form of increasing demands on existing resources and resource limitations imposed on new agencies and procedures. Second, new contexts, targets and styles of intervention have given rise to the need to innovate. More flexible and less formally constrained procedures are demanded in order to obtain information and to effectively regulate in these novel millieus tasks which may be difficult to achieve with existing procedures governed by due process principles.¹⁸¹

In Australia, Ingleby¹⁸² has raised similar concerns regarding the growth of alternative dispute resolution.

180 *Ibid.*

181 *Ibid*; see generally, O. Newman, *The Challenge of Corporatism* (1981) (London, Macmillan) and J. Winkler 'The Corporate Economy: Theory and Administration' in R. Scase (ed) *Industrial Society: Class, Cleavages and Control* (1975) (London, Allen and Unwin).

182 Ingleby, (1991) *op. cit.* 1, citing J. Raz, *The Authority of Law* (1979) (Oxford, Oxford University Press) at 218; J. M. Finnis, *Natural Law and Natural Rights* (1980) (Oxford, Oxford University Press) at 270; and L. L. Fuller, *The Morality of Law* (1964) (New Haven, Yale University Press) at 39.

Two particular aspects of the rule of law are endangered by the increasing development and institutionalisation of alternative dispute resolution procedures: (i) that the law should consist of publicly declared standards which are capable of being followed and understood by the public; and (ii) that there should be consistency between the content of the formal law and its application (citations omitted).

Further insights regarding the operation of Small Claims Courts are revealed from recent anthropological and socio-linguistic analyses¹⁸³ which examine Small Claims Courts from the perspective of those who utilise them. For example, Conley and O'Barr, building on their earlier study¹⁸⁴ of witnesses' speech styles in Courts, turned their attention to an ethnographic¹⁸⁵ analysis of the structure of witnesses' accounts in Small Claims cases. They discovered that the story-telling of many lay people is in marked contrast to the acceptable way of telling one's story in a legal case:

The ethnographic investigation of the form of accounts given in legal contexts thus sheds light on lay notions of story-telling, on the epistemological beliefs encoded in legal conventions for giving accounts and ultimately on reasons why many litigants are unhappy about the treatment they get in court. . . . Many litigants speak of their place in the network of social relations and

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- 183 See e.g., L. R. Cardoso de Oliverira, 'Fairness and Communication in Small Claims Courts', unpublished PhD Dissertation, Harvard University, 1989. (Relying on the theoretical insights of Jurgen Habermas, it is argued that previous analyses of small claims disputes have failed to consider the problems of fairness and power imbalances which exist in particular small claims cases).
- 184 W. M. O'Barr and J. M. Conley, 'Lay Expectations of the Civil Justice System' (1988) 22 *Law and Society Review* 136-161; see also, P. Carlen, *Magistrates' Justice* (1976) (London, Martin Robertson).
- 185 See e.g., W. M. O'Barr, and E. A. Lind, , 'Ethnography and Experimentation - Partners in Legal Research. in B. D. Sales (ed), *Perspectives in Law and Psychology* , (1977) Vol 1 (New York, Plenum). For a good general discussion of the inductive and qualitative methodology characteristic to ethnographic studies, see generally, P. Bohannan, 'Anthropology and the law' in S. Tax (ed) *Horizons in Anthropology* (1964) (Chicago, Aldine); K. F., Koch, (ed) *Access to Justice, Vol 4: Anthropological Perspectives* (1979) (Milano, Dott. A. Guiffre Editore); G. A. Snyder, 'Anthropology, dispute Processes and Law: A Critical Introduction', (1981) 8(2) *British Journal of Law and Society* 141-180.

emphasize the social context of their legal problems. They assign legal rights and responsibilities on the basis of social status and adherence to social conventions, and expects courts to do the same.

By contrast the official discourse of the law is oriented to rules. This orientation is typical of all forms of official legal discourse, including the discourse among legal professionals and the talk that characterizes the interaction of lawyers and judges with lay people. The dominant discourse of the law treats rules as transcending the social particulars of individuals cases. It thus rejects the fundamental premise of the relational orientation. For this reason lay people and legal professionals often hear each other as speaking different languages.¹⁸⁶

Conley and O'Barr argue that, not only is there a difference between a legal system which utilises a discourse of rules and most lay persons who utilise a discourse of relationship, but also:

the distribution of these orientations is not random, but is socially patterned. The discourse of relationships is the discourse of those who have not been socialized into the centres of power in our society. Gender, class, and race are deeply entangled with the knowledge of and ability to use the rule-oriented discourse that is the official approach of the law. Thus, it is no surprise that the agenda of relational speakers is often at variance with the agenda of the law.¹⁸⁷

While the concerns raised by such theorists as Conley and O'Barr are very real, there is also the danger that allowing parties unrestricted freedom to present their own cases without rules of evidence and other formalities will at best result in a sort of 'rough justice' and a system which is 'cheap' in the sense of a diminution in the quality of justice attained.¹⁸⁸ Finally, one must also keep in mind the linkage between perceptions of formality and the degree of

186 Conley and O'Barr (1990), *op. cit.* 172-73.

187 *Ibid.* 173.

188 Whelan (1990), *op. cit.* 231.

disputant knowledge about the Small Claims Court. In many cases, it is not the degree of formality which is the problem, as much as the disputants' ignorance of Court procedures which is the major problem. Accordingly, if the procedures are explained so that parties understand what is going on and feel at ease, there is likely to be little problem with hearing procedures.¹⁸⁹ According to this more optimistic view, enabling participants to participate in the judicial process, rather than being regarded as an intrusion of the capitalist state into private lives as Abel suggests, is in reality a 'welfare of enabling' which Beilharz and others have recently argued is a necessary precondition of true citizenship.¹⁹⁰

In summary, it is suggested that previous Small Claims research has placed too much emphasis on the desire for faster, cheaper justice; and has underestimated the importance of the disputant's perception of fairness. In short, reformers must be careful lest they, for the sake of expediency, undermine those features which most contribute to disputant satisfaction with the legal system, whether formal or informal. We need to be mindful of the words of US Supreme Court Justice Felix Frankfurter who concluded that '[t]he history of liberty has largely been the history of procedural safeguards'.¹⁹¹ Accordingly, an evaluation of Small Claims should weigh the balance of formal versus informal procedures.¹⁹² Is the Court or Tribunal formal enough, private enough, fair enough? Are parties aware of their rights and the limitations on those rights which are necessary to make the system work both fairly and efficiently?

4.3.10 Conciliation/Mediation vs Adjudication

Unlike some well established forms of ADR such as commercial arbitration,¹⁹³ there is no consensus regarding the meaning of the terms 'mediation' and

189 National Consumer Council (1989), *op. cit.* 302-03.

190 P. Beilharz, M. Considine, and R. Watts, *Arguing About the Welfare State* (1992) (Sydney, Allen and Unwin); see also, A. Yeatman, *Bureaucrats, Technocrats, Femocrats* (1990) (Sydney, Allen and Unwin).

191 *McNabb v United States*, 318 US 123, 179 (1951); see also, K. C. Davis, *Administrative Law Text* (1972) (3rd edn) (St Paul Minnesota, West Publishing Co) ('The essence of justice is largely procedural') at 192.

192 Compare J. Pea, *Tribunals on Trial* (1989) (Oxford, Clarendon Press) (an excellent analysis of such issues in the setting of Mental Health Review Tribunals).

193 Street (1992), *op. cit.* 197; see generally, A. Redfern and M. Hunter, *Law and Practice of International Commercial Arbitration* (1986) (London, Street and Maxwell); M. Fulton, *Commercial Alternative Dispute Resolution* (1989) (Sydney, Law Book Co).

'conciliation'.¹⁹⁴ For example, Lord Wilberforce¹⁹⁵ refers to 'conciliation' as the process by which the parties to a dispute are helped by an independent third party to reach an agreement which the parties work out amongst themselves; 'mediation', in contrast, goes one step further with the third party making their own recommendations. Ironically, Cornelius and Faire¹⁹⁶ define the terms exactly the opposite way. Street suggests that the line between conciliation and mediation is in many cases too fine to be workable.¹⁹⁷ Thus he recommends the single use of the word 'mediation', which may be more or less active.¹⁹⁸

While there is no consensus, even on the basic definitions of 'mediation' and 'conciliation', the recent emphasis on alternative dispute resolution mechanisms in many areas of the law has resulted in Small Claims systems similarly giving greater consideration to these more informal avenues of dispute resolution.

Most Small Claims studies indicate that a significant percentage of all cases commenced before the Court/Tribunal result in a settlement or agreement reached by the parties.¹⁹⁹ However, there is considerable variation within and among jurisdictions in the emphasis given to conciliation and mediation. While some Small Claims systems stress the role of Small Claims in the adjudication of disputes and pre-trial procedures which ready the case for hearing by a judge, other systems place more emphasis on conciliation and mediation.

Despite its importance, the role of the Small Claims Court or Tribunal in conciliation and mediation is one of the most under-theorised and under-researched aspects of Small Claims.²⁰⁰ Especially lacking in the literature is an

¹⁹⁴ Street (1992), *op. cit.* 195; see generally, M. Fulton, *Commercial Alternative Dispute Resolution* (1989) (Sydney, Law Book Co).

¹⁹⁵ Lord Wilberforce, Paper Published in *UNCITRAL Arbitration Model Law in Canada* (1987) (Carswell, Toronto) 7, in Street (1992), *op. cit.* 195,

¹⁹⁶ *Everyone Can Win* (1989) (Sydney, Simon Schuster) 151.

¹⁹⁷ Street (1992), *op. cit.* 196-197.

¹⁹⁸ *Ibid.*

¹⁹⁹ For example, in Tasmania, approximately a third of cases filed settle either prior to or during the hearing (Clark (1991), *The Tasmanian Small Claims Court: An Empirical Study*, Small Claims Case Flow, Hobart 88-89).

²⁰⁰ See L. R. Cardoso de Oliverira, *op. cit.* . The author, in his anthropological investigation of small claims, argues that insufficient attention has been paid to problems of communication and understanding, especially in regard to concepts of fairness, which have received scant attention. Oliverira found that an important

overall perspective of the relationship between various ADR's and the formal Court system.²⁰¹ Among the unanswered questions are: 1) to what extent is the judicial system succeeding in getting parties to reach a settlement? 2) what pressures are placed on parties to settle their claim; 3) if pressure to settle exists, what is its impact on litigants, for example, is it fair?; 4) what problems are encountered by a Magistrate who actively participates in a settlement then must switch to an adjudication role when the settlement fails to materialise? 5) how well do people trained in the adversarial system, adjust to the different requirements of a more inquisitorial role? 6) what do litigants expect to happen in a Small Claims system: do they expect to reach an agreement ; or is do they merely want the Magistrate to make a decision? 7) what differences do these perceptions make?; 8) is there a tendency for a 'split-the difference' attitude to occur in Small Claims cases which are often characterised by complex factual settings in which the adjudicator has limited fact-finding assistance, no aid of legal counsel, and considerable pressure to resolve the dispute? 9) What is the relationship between various features of Small Claims procedure and the willingness of disputants to settle?²⁰² These are just a few of the issues which await further investigation and take on special importance in settings where mediation is compulsory, or in Small Claims Court and Tribunal settings, such as Tasmania, which make settlement/conciliation their 'primary' function.²⁰³

4.3.11 Role and Qualifications of the Adjudicator and Court Staff *Training in Conciliation/Mediation*

It is not only in a conciliation/mediation role, that a Small Claims adjudicator differs from that of the traditional common law adjudicator. Small claims judges typically must wear the hats of finder, inquisitor, defender of the weaker

distinction exists between 'equitable agreements' and 'bargained for compromises'. While equitable agreements 'reveal the litigants' concerns with issues of fairness and a high degree of responsiveness to their demands towards issues of rightness, the bargained compromises are characterized by an emphasis on a more strategic orientation where the main concern of the parties is getting as much as possible under the circumstances, or the most reasonable settlement from that perspective.' (abstract). See generally, J. Habermas, *Moral Consciousness and Communicative Action* (1990) (Cambridge, Massachusetts, MIT Press).

201 P. B. Edelman, 'Institutionalizing Dispute Resolution Alternatives' (1984) 9 (2) *Justice System Journal* 134-50; Sallman, (1990) *op. cit.* 108-109.

202 Yngvesson and Hennessey, *op. cit.* 260, argue, for example, that disputants who feel they have the opportunity to present their side of the story are more likely to settle.

203 Sallman, (1990) *op. cit.* 109; see generally, Ingleby, (1990), *op. cit.* .

party who lacks the education and experience to fully understand the system, Court administrator, enforcer, etc.²⁰⁴ Not surprisingly, many judges report feelings of unease and role conflict in adjusting to this myriad of roles, many of which go against the grain of their traditional training and experience which assumes the help of partisan legal representatives skilled in representing their clients.²⁰⁵ As Fuller describes it, the Small Claims judge:

must undertake, not only the role of the judge, but that of representative for both the litigants. Each of these roles must be played to the full . . . When he is developing for each side the most effective statement of its case, the arbiter must put aside his neutrality and permit himself to be moved by a sympathetic identification sufficiently intense to draw from his mind all that it is capable of giving. . . When he resumes his neutral position, he must be able to view with distrust the fruits of this identification and be ready to reject the products of his own best mental efforts. The difficulties of this undertaking are obvious. If it is true that a man in his time must play many parts, it is scarcely given to him to play them all at once.²⁰⁶

While Small Claims adjudicators are called upon to play many roles, their background and qualifications are predominantly legal. Few judges would have the requisite training in psychology, sociology, conciliation and mediation, conflict resolution and so on, to equip them adequately for their difficult role. Not surprisingly, a number of studies have reported that many judges are less than enamoured with Small Claims duty, provide little assistance to disputants,²⁰⁷ emphasise efficiency and getting through the cases ahead of

204 Whelan (1990), *op. cit.* 226- 227; Ruhnka and Weller, *Small Claims Court: A National Examination* *op. cit.* 32; Yngvesson and Hennessey, *op. cit.* 223-224..

205 DeJong, Goodlasian and McGillis, *op. cit.* 2 ('Many judges do not savour Small Claims duty, viewing the work as stressful, trivial, and tiresome'.); Beresford, 'It Takes a Big Judge to Handle Small Claims' (Fall 1977) 16 *Judges J.* 14-16 (judges often do not like hearing small claims). A. Sarat, 'Alternatives in Dispute Processing: Litigation in a Small Claims Court' (1976) 10 *Law and Society Review* 339, 353.

206 L. L. Fuller, 'The Forms and Limits of Adjudication', (1978) 92 *Harvard Law Review* 353, 382-383, cited in Whelan, *op. cit.* 227.

207 See Note, Prosecution and Intimidation, *op. cit.* 1665.

the need for parties to tell their own story,²⁰⁸ and are more adversarial rather than inquisitorial in the application of formal rules of evidence.²⁰⁹

Judicial Education Regarding Consumer Law

Even in regard to legal matters, the case for more training is compelling, given the increasingly broad jurisdiction of Small Claims Courts and the plethora of new legislation, especially in consumer law.²¹⁰ In recent years, in Australia, there has been a considerable growth in judicial education;²¹¹ yet much more remains to be done, especially in regard to Small Claims procedures and issues. As a result of all these factors, there is considerable diversity between jurisdictions and between Magistrates, Referees or Registrars within the same system.²¹²

Training of Court Staff

Court staff, too, must receive training to enable them to meet the specific needs of Small Claims disputants. The neglect of this valuable resource in Australia was noted by the Coopers & Lybrand study of the NSW Court System which found there were severe staffing problems, the main problems being the acquisition of highly qualified people, training, the absence of appropriate career structure, and a huge turnover of staff.²¹³ As Sallman has observed:

Despite the image of the law and the Courts in the media, literature and perhaps the popular imagination, Courts are generally not attractive, glamorous places to work in or work for. Conditions are often antiquated, the work dull and repetitive, the organisational structures fragmented, complicated and confusing; there is an absence of

208 See DeJong, Goolkasian and McGillis, *op. cit.* 3; Gould, *op. cit.* 134-35.

209 See Elwell and Carlson, *op. cit.* 447-448.

210 For a discussion of the many changes in the legal system which have taken place in the last decade see, J. Starke, 'A Decade of Legal Change in Australia, 1981-1990' (December 1990) 64 *ALJ* 751-753.

211 Sallman, (1990) *op. cit.* 109 (e.g. programmes offered for judicial officers by The Judicial Commission of New South Wales and the Australian Institute of Judicial Administration).

212 National Consumer Council (1989), *op. cit.* 286-87.

213 See Sallmann, (1990) 110; see generally R. Zimmerman, 'From Chaos to Excellence: Four Tough Years' (1988) 12 (3) *State Court Journal* 13-18.

appropriate training and career structure, a lack of esprit de corps and no feeling of being part of a worthwhile, corporate enterprise which has real significance to the community.

Indeed, for most disputants, the quality and helpfulness of Small Claims staff will be important determinants of their perceptions of the Small Claims Court.²¹⁴

Accordingly, much attention in the years ahead must be devoted to the immediate problem of staff qualification, training and development. On a more fundamental level, too, research is necessary to measure the desirability and cost effectiveness of compelling the use of alternative dispute resolution procedures by Courts and Tribunals.²¹⁵ Finally, the rapid increase in Small Claims usage coupled with diminished public resources has given rise to other unstudied problems such as Referee or Magistrate 'burn-out'.²¹⁶

4.3.12 Enforcement

A final issue emerging from the Small Claims literature is the problem of enforcing Court orders in relation to small claims. Surveys of Small Claim disputants frequently cite enforcement problems as one of the major failings of the system.²¹⁷ Claimants who have invested considerable time, emotion and energy into proving their claim, are frequently dismayed to find that enforcing the Court's order will require the investment of further funds and time, with no guarantee of any success. Indeed, empirical studies done in the U.S. show low

214 See S. Weller, J. A. Martin and J. C. Ruhnka, 'Litigant Satisfaction with Small Claims Court: Does Familiarity Breed Contempt? (Spring, 1979) *State Court Journal* 3 at 5 ('Our data show that the quality of contact with other actors in the judicial process can also have an important effect on litigant satisfaction. Reported experiences with two actors in particular, court clerks and opposing attorneys, was strongly related to litigant satisfaction. Court clerks play an important role in the small claims process, especially for plaintiffs, since most small claims courts these clerks are an important source of trial preparation advice for plaintiffs').

215 See generally, Ingleby, (1991) *op. cit.* .

216 See generally, DeJong, Gooklasian and McGillis, *op. cit.* 2; Ruhnka and Weller (1978) *op. cit.*

217 Whelan (1990), *op. cit.* 220-221; Gould, *op. cit.* 183-185; Elwell and Carlson, *op. cit.* 450; Ruhnka and Weller (1978), *op. cit.* 161-169; Best and Anderson, 'Consumer Response to Unsatisfactory Purchases: A Survey of Perceiving Defects, Voicing Complaints, and Obtaining Redress' (1977) 11 *Law & Soc'y Rev* 701, 733.

rates of collection ranging from only 25% to 75% with a disturbing number of disputants unable to collect any of their judgment.²¹⁸ Questions thus arise regarding how well the Court system informs litigants of potential problems of enforcement. How can the system filter out claims which should not be pursued because of the poor chance of collection? How can the Court better ensure efficient enforcement of its orders? How can disputants be better informed about collection processes? Thus, the effectiveness of enforcement procedures is an important aspect of Small Claims which should be investigated in any evaluation of a Small Claims system.²¹⁹

4.3.13 Disputant Satisfaction: Public Expectations and Small Claims Court Realities

It must be acknowledged at the start that any discussion about public expectations and satisfaction with Small Claims Courts is an elusive topic. This elusiveness is due in part to the fact that different groups of the public will have different conceptions of justice, different expectations of the legal system and justice in general and of Small Claims Courts in particular.²²⁰ As philosopher Alasdair MacIntyre has recently written of the existence of 'conflicting perceptions of justice':

Some conceptions of justice make the concept of desert central, while others deny it any relevance at all. Some conceptions appeal to inalienable human rights, others to some notion of social contract, and others again to a standard of utility. Moreover, the rival theories of justice which embody these rival conceptions also give expression to disagreements about the relationship of justice to other human goods, about the kind of equality which justice requires, about the range of transactions and persons to which considerations of justice are

218 Elwell and Carlson, *Iowa Small Claims*, *op. cit.* 450; DeJong, Goolkasian and McGillis, *op. cit.* 5.

219 Some of the recommendations for reform in this area include: better information, greater clerk assistance; simplification of procedures; imposition of large interest penalties on unpaid judgments and criminal sanctions for wilful non-payment. See Gould, *op. cit.* 191-193; Ruhnka and Weller (1978), *op. cit.* 94; Frierson, *op. cit.* 21.

220 See J. Conley and W. O'Barr, *Rules Versus Relationships* (1990) (Chicago, University of Chicago Press).

relevant, and about whether or not a knowledge of justice is possible without a knowledge of God's law.²²¹

While acknowledging the difficulty of finding a common denominator upon which to measure satisfaction, what is it about having contact with the Small Claims Court which seems to cause a litigant to be either satisfied or dissatisfied with this experience? Weller and Ruhnka found that while there are some factors within the control of the Court which might improve disputant satisfaction, other factors are outside the Court's control. Two of the factors impacting satisfaction which were beyond the control of the Court were the inherent trauma of being a defendant, regardless of the outcome, and losing.²²² However, there were other variables, within the Court's control, which accounted for a high percentage of the total variance in plaintiff satisfaction. These variables in order of importance were: clerk helpfulness, the degree of understanding of one's legal rights, and understanding of the Court process.²²³

Weller, Martin and Ruhnka conclude that 'it is the quality of contact, not the mere fact of contact that primarily determines litigant satisfaction.'²²⁴ It is further hypothesised that the degree of satisfaction with the Court had less to do with the poor functioning of the Court than with two other functions: 1) the expectations of some members of the public for the judicial system being so high that disillusionment results when the system is experienced first hand; and 2) the inherent trauma, especially that associated with being a defendant and with losing.²²⁵

While the experimental data is fairly primitive and conclusions necessarily tentative, it does appear that 'reforms aimed at increasing a litigant's

221 A. MacIntyre, *Whose Justice Which Rationality* (1988) (Notre Dame, Ind, University of Notre Dame Press), p. 1.

222 S. Weller, J. Martin, and J. C. Ruhnka, 'Litigant Satisfaction with Small Claims: Does Familiarity Breed Contempt?' (Spring 1979) *State Court Journal* 3 (While approximately two thirds of plaintiffs were satisfied with their experiences, only slightly more than half of the defendants reported being satisfied).

223 *Ibid* 8.

224 *Ibid*

225 *Ibid* 3; see also, A. Sarat, 'Studying American Legal Culture, An Assessment of Survey Evidence,' (Winter 1977) *Law and Society Review* 11.

understanding of the system should have a positive effect on litigant satisfaction.²²⁶ Obviously, too, much more research is necessary in order for us to understand how public satisfaction with Small Claims systems might be improved.²²⁷

4.4 Evaluation Theory and Practice

4.4.1 Importance of Evaluation

An important theme which emerges from the Small Claims literature, and one which has often received too little attention, is the important role of program evaluation. 'Evaluation research is a large and expanding area of policy analysis devoted to collecting, testing, and interpreting information about the implementation and effectiveness of existing policies and public programs.'²²⁸ Social science research methods provide a useful framework enabling one to assess how well the principles of problem formulation, design, sampling, data collection and data analysis have been applied in a particular evaluation. These tools also help reduce error and enable judgments to be based upon more than mere hunch or guess-work.²²⁹ Indeed, so important has program evaluation become in assessment of public policy, that some scholars argue it is now a separate discipline distinct from traditional social science research.²³⁰ Regrettably, Courts, in contrast to other public institutions, have been slow to respond to the need for empirical validation of the effectiveness of what they do. As Posner has observed:

Lawyers, including judges and law professors, have been lazy about submitting their hunches - which in

226 *Ibid.*

227 For a more complete discussion of the data see Ruhnka and Weller (1978), *op. cit.*

228 G. Majone, *Evidence, Argument and Persuasion in the Policy Process* (1989) (New Haven, Yale University) 167.

229 M. J. Smith, *Program Evaluation in the Human Services* (1990) (New York: Springer Publishing Co) 15-16 .

230 See G. F. Madaus, M. Scriven, and D. L. Stufflebeam (eds) *Viewpoints on Educational and Human Services Evaluation* (1983) (Boston: Kluwer-Nijhoff) 15-16.

honesty we should admit are often little better than prejudices - to systematic empirical testing.²³¹

4.4.2 Multi-purpose Role of Small Claims Systems Evaluations

Program evaluation serves a number of purposes.²³² First, it provides a service to organisations, agencies and institutions.²³³ Evaluative research helps a Small Claims Court/Tribunal or other agency or institution determine whether it is fulfilling its goals and objectives. Indeed, the process of evaluation itself often helps staff to examine the broader picture and think through the rationale for and clarify the goals of a particular program.²³⁴

4.4.3 Evaluation to Determine How the Small Claims System is Working

Second, program evaluation also provides valuable insights into how a program actually works.²³⁵ The value of information, as a resource, is today almost a cliché.²³⁶ Nevertheless, the process of evaluation assists an organisation in organising, systematising and filtering information so that it can enhance its ability to monitor its performance and adjust to changing circumstances.²³⁷

4.4.4 Accountability

A third important function of evaluation is accountability. Human service professionals have a responsibility, a public trust, to provide satisfactory reasonable justification for the services they provide.²³⁸ This requires that

231 R. Posner, 'The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations' (1986) 53 *University of Chicago Law Review* 366, 367.

232 Majone, *op. cit.* 170.

233 Smith (1990), *op. cit.* 17-18.

234 *Ibid.* 17-18. See also, E. J. Clynnch and D. W. Neubauer, 'Trial Courts as Organizations: A Critique and Synthesis', (1981) (3) (1) *Law and Policy Quarterly* 69-94.

235 See A. B. Blalock, 'Evaluating Programs' in A.B. Blalock (ed), *Evaluating Social Programs at the State and Local Level*, (1990) (Kalamazoo Michigan, W. E. Upjohn Institute of Employment Research), at 14.

236 See generally, B. Bozeman and J. D. Straussman, *Public Management Strategies: Guidelines for Managerial Effectiveness* (1990) (San Francisco: Jossey-Bass).

237 See Bozeman and Straussman (1990), *op. cit.* 19-20. See also, T. R. Johnson, and E. W. Stromsdorfer, 'Evaluating Net Program Impact' in A. B. Blalock *op. cit.* 43.

238 See R. Hadley and K. Young, *Creating a Responsive Public Service* (1990) (Hertfordshire, UK, Simon & Schuster).

public servants be accountable to the people for whom the service is provided, professionally accountable in their particular area of expertise, accountable to the government body which funds the program, and accountable to the community in which the program is situated.²³⁹ Evaluation research provides professionals with knowledge about their programming efforts and how well social problems are being solved.²⁴⁰

Such accountability is also a feature of the modern political landscape.²⁴¹ Indeed, Freeman and Rossi²⁴² argue that program evaluation is by its very nature political. All social programs, including Court systems,²⁴³ are political and take place in a political decision-making environment. As such, various programs compete with each other for funds from various levels of government, organisations, etc. Choices must be made between funding and not funding, continuing and discontinuing, expanding or contracting one program vis-a-vis another.²⁴⁴ Ultimately, such political decisions require

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- 239 See generally, A. B. Blalock (ed), *Evaluating Social Programs at the State and Local Level*, (1990) (Kalamazoo Michigan, W. E. Upjohn Institute of Employment Research) .
- 240 See J. Pietrzak, *Practical Program Evaluation*, (1990) (London, Sage Publications) .
- 241 R. Morris (ed), *Testing the Limits of Social Welfare: International Perspectives on Policy Changes in Nine Countries* (1988) (Hanover, University Press of New England) 6-7; See generally, D. Feldman, 'User-Centered Evaluation Planning' in Blalock, *op. cit.* 301; C. E. Lindblom, *The Policy Making Process* (1968) (Englewood Cliffs, NJ, Prentice-Hall)
- 242 P. H. Rossi and H. E. Freeman, *Evaluation: A Systematic Approach* (1989) (Beverly Hills, CA: Sage Publications), cited in Smith, *op. cit.* at 21. See also C. H. Weiss 'Where Politics and Evaluation Research Meet', In D. Palumbo (ed) *The Politics of Program Evaluation* (1987) (Newberry Park, CA: Sage Publications) 47-48.
- 243 See e.g., H. Ball, *Courts and Politics: The Federal Judicial System* (1980) (Englewood Cliffs, NJ, Prentice-Hall); T. L. Becker and M. M. Freely (eds) *The Impact of Supreme Court Decisions* (2nd edn) (1973) (New York, Oxford University Press); E. N. Beiser, 'The Rhode Island Supreme Court: A Well-Integrated Political System,' (1973) 8(2) *Law and Society Review* 167-86. A. Cox, *The Role of the Supreme Court in American Government* (1976) (New York, Oxford University Press); J. H. Choper, *Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court* (1980) (Chicago, Chicago University Press); S. Diver, 'The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions', (1979) 65 *Virginia Law Review* 43-106.
- 244 Majone, *op. cit.* 182, ('As Geoffrey Vickers has observed, there have been times in the not-so-distant past when popular expectations were relatively clear, realistic and verifiable - the maintenance of law and order, a stable currency, a stable level of taxation, relief of extreme poverty. Today we expect much more from our government, but we do not know how any government could fulfil our expectations.'). See also, R. Morris (ed), *Testing the Limits of Social Welfare: International Perspectives on Policy Changes in Nine Countries* (1988) (Hanover, University Press of New England) 6-7.

information, feedback, regarding the extent to which the program is working.²⁴⁵ Finally, it is important to caution against reliance on accountability measures which are attractive because of their simplicity, but unreliable because they fail to account for the complexities which mark institutions such as Courts.²⁴⁶ For example, relying on quantifiable measures of inputs and outputs will often fail to account for process and contextual variables which tell the rest of the story. As Majone states, '...the best outcome measures never capture more than a small fraction of the total range of performance that is important to the organization.'²⁴⁷

4.4.5 A Plurality of Evaluation Paradigms

While the importance of program evaluation seems clear, more problematic is the question of exactly what form any particular evaluation should take.²⁴⁸ Indeed, evaluation theories,²⁴⁹ echoing similar debates in jurisprudence, have been characterised by a bubbling cauldron of philosophical argument as empirical-analytical positivists have vied for epistemological supremacy over intepretivists and others who argue that social realities cannot always be adequately measured, predicted or understood by the application of scientific methodology.²⁵⁰ Thus, impact studies which have sought to evaluate the effectiveness of a particular piece of legislation, while representing the most common type of social-legal research, have been the focus of much

245 Smith, *op. cit.* 20-22.

246 See e.g., R. Morris, *op. cit.* at 6 (notes that one of the major trends of the 1980's evident in most countries is '[A] marked increase in evaluating social programs by their impact on economic development.' This is usually founded on a philosophy of economic rationalism and an over-reliance on quantifiable , short-term, gains).

247 Majone, *op. cit.* 174. ('For example, sales volume is an unambiguous and robust output measure, but it tends to focus too narrowly the attention of salespeople on maximizing sales in the short run, with the result that they ignore other functions that have a large effect on future sales. People on straight commission have no incentive to arrange stocks, take inventory, or train new salespeople who become their competitors, and their supervisor cannot affect their salary by taking into account the other, unmeasured goals.' at 174).

248 See generally, W. R. Shadish, T. D. Cook, and L. C. Leviton, *Foundations of Program Evaluation: Theories of Practice*, (1991) (London, Sage Publications) ; L. J. Cronbach et al, *Toward Reform of Program Evaluation: Aims, Methods, and Institutional Arrangements*, (1980) (San Francisco, Jossey-Bass); M. C. Jackson, P. Keys, and S. A. Cropper (eds), *Operational Research and the Social Sciences*, (1989) (New York, Plenum Press) .

249 See, J. C. Alkin, *Debates on Evaluation* (1990) (London, Sage).

250 See generally, E. G. Guba, *The Paradigm Dialogue*, (1990) London, Sage Publications.

criticism²⁵¹ because such research has failed to produce any broad theoretical framework. As Tomasic²⁵² argues:

Such studies have rarely sought to evolve any broad body of theoretical propositions as they more often than not have tended to have very limited 'one-shot' goals formulated to meet the needs of policy-makers or funding agencies. At the basis of this body of writing is the so-called 'gap' between the 'law in the books' and the 'law in action'. As Abel and others have pointed out, this kind of study invariably concludes that there is indeed a gap between the law as made by the law-maker and as it is implemented in society. Unfortunately, this simplistic conclusion is usually all that tends to be found, so that many have argued that the gap approach is a theoretically sterile one.

Still other theorists maintain that conclusions, such as that drawn by Tomasic above are premature and that theoretical insights may yet emerge from such studies. Nelken,²⁵³ for one, maintains that impact research need not be devoid of theoretical insights. Indeed, there is nothing invalid about a focus on the discrepancy between legislative promise and performance provided that the set of statements of the proclaimed objects of the legislation and the various accounts of its effect are treated as data worthy of investigation in their own right. The relationship that such claims may or may not bear to the facts revealed by independent investigation can then be regarded as a fertile source of research problems.

While problematic these paradigmatic shifts are nevertheless important because they depict the struggle of evaluators to determine the nature of social

251 See e.g., A. Podgorecki, *Law and Society* (1974) (London, Routledge and Kegan Paul) at 41; ; Tomasic (1985), *op. cit.* 107; See generally, P. Nonet and P. Selznick, *Law and Society in Transition: Toward Responsive Law* (New York, Harper and Row) (1978).

252 Tomasic (1985), *op. cit.* 106.

253 D. Nelken, 'The "Gap Problem" in the Sociology of Law: A Theoretical Review' (1981) (1) *The Windsor Yearbook of Access to Justice* 35, 45; Tomasic (1985), *op. cit.* 107; See also, D. Nelken, 'Is There a Crisis of Law and Legal Ideology?' (1982) 9(2) *Journal of Law and Society* 177-89

knowledge itself and remind us of how truly little we know about law and legal institutions and the people who work in and come into contact with them.

4.4.6 Methodological Problems Inherent in Small Claims Court/Tribunal Evaluation

Not all evaluation problems, however, are philosophical ones. Complex social contexts such as Small Claims Courts and Tribunals have proven to be very difficult to evaluate, even at the most descriptive level. Just to take one example, at first glance, determining who wins in a Small Claims proceeding appears to be a simple task. Indeed, earlier studies of Small Claims systems merely reported as the 'winner', the party for whom judgment was given.²⁵⁴ Consequently, it was often reported that, in the vast majority of cases, plaintiffs were the 'winners' in Small Claims Courts and Tribunals. Such an approach, however, failed to consider the perceptions of the parties. A claimant, convinced that he or she is 100% in the right, but who is awarded only 50% of the claim will most likely view the decision as a loss. Conversely, a defendant who expected to pay out 80% of the claimed amount, but is ordered to pay only 40% of the amount claimed will likely regard the decision in their favour. Also, in a common consumer context, a buyer may refuse to pay for a product because of some dissatisfaction about its quality. The trader subsequently sues in Small Claims Court and is awarded an amount less than the original price. Can it be said that the trader won? Earlier studies which reported that Small Claims plaintiffs almost always win were to this extent often misleading. A more accurate measure of who wins needs to take into account such factors as the percentage which the award bears to the amount claimed, the perceptions of the parties, etc.²⁵⁵

This apparently simple issue demonstrates how difficult it is to come to grips with the reality of Small Claims Courts, a reality which can often be hidden by crude measures of the type normally available from such documents as Court records.

4.4.7 Taking into Account the Evolutionary rather than Revolutionary Development of Small Claims Courts and Tribunals

254 Whelan (1990), *op. cit.* 219.

255 N. Vidmar, 'The Small Claims Court: A Reconceptualization of Disputes and an Empirical Investigation', (1984) 18 *Law and Society Review* 515, 545.

A final important theme to be gleaned from a study of Small Claims Courts is that modern solutions regarding the best way to resolve disputes involving small claims could hardly be described as revolutionary. For the most part, Small Claims Courts or Tribunals have evolved from earlier pre-existing legal institutions.²⁵⁶ Modern developments relating to Small Claims Courts and Tribunals thus bear a striking resemblance to earlier structures and experience in judicial reform.²⁵⁷ For example, Applebey has observed that the 1970s English Small Claims reforms which sought to 'facilitate action by litigants in person were really an attempt to recapture some of the original spirit of county Court procedures' adopted in the previous century.²⁵⁸ Similarly, Frame points out that modern New Zealand Small Claims procedure has historical antecedents dating back to 1846.²⁵⁹ The point to be stressed here is that an analysis of Small Claims dispute resolution in any particular jurisdiction must take into account the historical, political and legal setting from which the present day system emerged as well as variations attributed to the particular local legal culture involved.²⁶⁰

Regrettably, too many evaluators, steeped in analytic positivism, have ignored such political and historical realities because they are difficult, if not impossible to quantify.

4.5 Conclusion

American attorney, Reginald Herber Smith, writing in 1919, observed:

The inability to provide justice in small causes has always been one of the weakest points in our system of administering justice. From the days of ordeal by battle, the method provided by the common law for proving and reducing to judgment any type of small

256 See E. Steele, 'The Historical Context of Small Claims Courts, (1981) *Am. B. Found. Res. J.* 293; Whelan (1990) *op. cit.* 208-212.

257 Whelan (1990), *op. cit.* 208-212.

258 G. Applebey, *Small Claims in England and Wales* (1978) (Birmingham: Institute of Judicial Administration) 5.

259 A. Frame, 'Fundamental Elements of the Small Claims Tribunal System in New Zealand' in C. J. Whelan, (1990) *op. cit.* 73-74.

260 Ingleby (1991), *op. cit.* 6.

claim has been cumbersome, slow and expensive out of all proportion to the matter involved.²⁶¹

The need to develop special legal mechanisms to handle small claims is not new. Accordingly, a wide diversity of Courts, Tribunals and special procedures have evolved with the aim of providing a speedy, inexpensive, and simple procedure to resolve claims involving small amounts. While the need for a system of handling small claims has long existed, judicial, political, and scholarly interest in Small Claims dispute resolution has tended to wax and wane.

In the last ten years, especially in the UK and United States, 'access to justice' research has been high on state, local and national agendas. The winds of consumerism, demands for greater accountability and other societal forces, have resulted in a plethora of legislative reform. These are just a few of the factors which have fanned the flames of recent interest in Small Claims Courts and Tribunals.

Though most of the research on Small Claims Courts and Tribunals has been descriptive rather than empirical, there is evidence in some jurisdictions, that the original goals of speed and low cost are to a certain extent being achieved.²⁶² However, in other jurisdictions Small Claims Courts have ironically been characterised by 'excessive delays, high costs to litigants, cumbersome procedures, and inaccessibility to ordinary citizens'²⁶³ --the same deficiencies of regular Courts which led to their establishment in the first place.²⁶⁴ It is accordingly clear that many issues remain unresolved and that further reforms²⁶⁵ are perhaps required. In particular, the accessibility of Small Claims Courts to the average citizen, the role of conciliation, problems of

261 R. H. Smith, *Justice and the Poor* (1919) (Chicago: American Judicature Society, Bulletin 7; reprinted, Chicago: National Legal Aid and Defenders' Association, 1967). Cited in Whelan (1990), 208.

262 Obviously the extent to which this is so varies widely depending upon the court or tribunal involved.

263 W. DeJong, *Small Claims Court Reform* (1983) (Washington, D.C., National Institute of Justice) 2.

264 *Ibid.*

265 Several reports and their recommendations for reform have been mentioned previously, most notably those of Ruhnka and Weller in the United States, Whelan and the Civil Justice Review in the UK, Vidmar and Ramsay in Canada, the Department of Justice Report in New Zealand, and de Vaus in Australia.

enforcement, the lack of knowledge and experience of litigants, the delicate balance between formality/informality, rules/discretion, private/public hearings, and legal representation/no legal representation are just a few of the major areas requiring further investigation.

Not only is the existing legal system facing competition from alternative dispute resolution, but law itself must vie with education, defence, social security, transportation and other interests in a time of government contraction and scarce resources. In this age of judicial uncertainty, one thing is certain: Courts and Tribunals must regularly and systematically examine their aims and goals and evaluate the extent to which they are being achieved. This task requires that Small Claims Courts and Tribunals develop a base of quantitative and qualitative data to aid officials in their decision making and in their ability to demonstrate, to both the public and governmental authorities, the actual effects of the Small Claims system. Constructive self-analysis by Courts and Tribunals and their own clear sighted proposals for management of change reflect more than a healthy sense of public image. By such a process, Small Claims systems will be both continually improved and accountable with integrity.

Chapter 5

METHODOLOGY

5.1 Introduction

Speaking about the work of the Australian Institute of Judicial Administration, Chief Justice Sr Anthony Mason observed:

[I]n recent years, increasing emphasis has been given to research projects which will provide an accurate and revealing picture of how the existing justice system is performing in some of its aspects and how it might be improved. The emphasis on research flows from the recognition that we lack reliable objective information about the performance of the existing system and about the impact and consequences of many crucial procedures which we have long taken for granted. Without the accurate and revealing picture that independent research provides, it is not possible to identify with confidence the ultimate causes of inefficiency and the likely consequences of planned reforms. When expressing opinions about the judicial system, judges tend to rely heavily on anecdotal evidence and generalised impressions founded in particular cases, notwithstanding that this tendency, when displayed by others, is often the subject of judicial rebuke.¹

In the spirit of the Chief Justice's remarks, this dissertation reports on the results of an empirical analysis of the Tasmanian Small Claims Division of the Magistrates Court. As indicated in Chapter One, the major question investigated by this study involves an appraisal of how the Small Claims system is working and how it might be improved.

¹ 'Research to Improve Judicial Administration Through Institutes of Judicial Administration - the Australian Institute of Judicial Administration' (1991) 65 *A.L.J.* 78, 79 (based upon an address given on 13 September, 1990 to the Fifth International Appellate Judges' Conference, Washington, D.C..)

5.2 Existing Paradigms of Court Research²

Empirical study of Courts and processes of dispute resolution is a comparatively recent development and hardly two decades old.³ Heavily influenced in its neophyte stages by anthropological investigations,⁴ dispute resolution has been investigated by a wide number of other disciplines as well including, sociology, political science, psychology, history, and socio-linguistics.⁵ Indeed, evaluation itself has become so prevalent that many argue that it has emerged as a discipline in its own right.⁶ The same point could be argued of judicial administration.⁷

While Courts and dispute resolution have been studied from diverse perspectives, no dominant paradigm has emerged.⁸ In sociologically-based Court studies, for example, earlier work focused upon the dispute and the role of dispute resolution played by formal institutions,⁹ such as Courts,¹⁰ as well as less formal avenues of dispute resolution, such as Tribunals,¹¹ Neighbourhood Justice Centres¹² and

² The writer is deeply indebted in the description of paradigms presented here to the excellent analysis of R. Tomasic, *The Sociology of Law* (1985) (London, Sage) at 55-82.

³ *Ibid* 81.

⁴ See e.g., Llewellyn's, *The Cheyenne Way* (1941) and Hoebel and Peltason's study of *Federal Courts in the Political Process* (1955).

⁵ See Chapter 2 for examples of this research as it relates to small claims.

⁶ See generally, G. F. Madaus, M. Scriven and D. L. Stufflebeam (eds), *Viewpoints on Educational and Human Services Evaluation* (1983) (Boston, Kluwer-Nijhoff).

⁷ Note the development of Institutes of Judicial Administration in Australia and England, judicial administration journals (for example Australia's *Journal of Judicial Administration*), as well as formal courses of study in judicial administration, for example at the University of Wollongong.

⁸ Tomasic, *op. cit.* 58ff.

⁹ See e.g., J.C. Ruhnka, *Housing Justice in Small Claims Courts* (1979) (Williamsburgh, Va, National Center for State Courts).

¹⁰ See e.g. D. M. Trubek, 'Studying Courts in Context' (1980-1) 15 (3-4) *Law and Society Review* 501. (The entire issue is devoted to a report on the Civil Litigation Research Project at the University of Wisconsin) Most of empirical studies of Courts have been of lower Courts. The higher Courts are largely unstudied.

¹¹ See e.g. D. deVaus, 'Small Claims Tribunals: An Effective Alternative to the Court System?' (1987) 22 *Australian Journal of Social Issues* 597.

¹² See e.g., R. Tomasic and M. Feeley, *Neighborhood Justice: Assessment of an Emerging Idea* (1982) (New York, Longmans).

mediation.¹³ Other writers,¹⁴ however, argue that a dispute-centred focus lacks a sound theoretical base and presents a simplistic picture of the role of Courts in society. Accordingly, writers such as Felstinger, Abel and Sarat¹⁵ have focused on the origins of disputes and on society as a whole rather than on formal court dispute resolution. Attempting to find connecting threads in this disparate body of work, Ritzer¹⁶ describes a 'multi-paradigmatic' view of Court research, arguing that three distinct paradigms have emerged from the study of Courts, especially lower Courts. These are the 'social fact' paradigm, 'social definition' paradigm and 'social behaviour' paradigm.

The 'social fact' paradigm is exemplified by the work of functionalists such as Durkheim and Parsons generally and by Levin¹⁷ and Eisenstein and Jacob¹⁸ in Court research specifically.¹⁹ Social factists view institutions and legal structures as though they were real, as opposed to constructs of the people who work in them.²⁰ Methodologically, adherents of this paradigm strive to be as scientific as possible and thus emphasise quantitative, 'hard' methodologies, such as interviews and questionnaires as opposed to qualitative or 'soft' ones, such as observations and other ethnographic techniques.²¹

¹³ See e.g., R. Tomasic and M. Feeley, 'Mediation as an Alternative to Adjudication', in Tomasic and Feeley *op. cit.* . See also discussion of Alternative Dispute Resolution in Chapter 2 of this thesis.

¹⁴ See e.g. ; J. M. Fitzgerald, 'Grievances, Disputes and Outcomes: A Comparison of Australia and the United States' (1983) 1 *Law in Context* 15-45; R. L. Kidder, 'The End of the Road? Problems in the Analysis of Disputes' (1980-81) 15 (3-4) *Law and Society Review* 717-25.

¹⁵ W. L. F. Felstiner, R. Abel and A. Sarat, 'The Emergence and Transformation of Disputes: Naming, Blaming and Claiming. . .' (1980-81) 15 *Law and Society Review* 631-54

¹⁶ See generally G. Ritzer, *Sociology: A Multiple Paradigm Science* (1975) (Boston, Allyn & Bacon).

¹⁷ M. A. Levin, *Urban Politics and the Criminal Courts* (1977) (Chicago, University of Chicago Press).

¹⁸ J. Eisenstein and H. Jacob, *Felony Justice: An Organizational Analysis of Criminal Courts* (1977) (Boston, Little, Brown and Co).

¹⁹ Tomasic (1985) *op. cit.* 69-73.

²⁰ *Ibid* at 67.

²¹ *Ibid* .

The 'social definition' paradigm focuses not on the institution, or the group, but on the individual within institutions.²² Institutions are viewed as mere constructs of humankind's creativity.²³ Weber's theory of social action and the work of symbolic interactionists exemplify this approach.²⁴ Methodologically, studies following this paradigm rely primarily upon qualitative measures such as observation.²⁵ Court research examples include Feeley's²⁶ study of sentencing and adjudication and Carlen's²⁷ study of London Magistrates' Courts which built 'on social factist studies by resort to social definitionist perspectives.'²⁸

Social behaviourism, the third major paradigm of Court research, is heavily influenced by Skinner and uses reinforcement to account for the behaviour of individuals in a particular environment.²⁹ Tomasic argues that the behaviourist approach is 'theoretically the least promising of these paradigmatic approaches.'³⁰ Perhaps the best known example of this type of research is Thibaut and Walker's³¹ controversial³² analysis of the advantages of the adversary versus inquisitorial system.³³

²² *Ibid.*

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ *Ibid.* 67-68.

²⁶ M. M. Feeley, *The Process is the Punishment: Handling Cases in Lower Criminal Court* (1979) (New York, Russell Sage Foundation).

²⁷ P. Carlen, *Magistrates' Justice* (1976) (London, Martin Robertson).

²⁸ Tomasic, *Sociology of Law* at 75. See e.g. A. S. Blumberg, *Criminal Justice Issues and Ironies*, 2nd edn, (1979) (New York, New Viewpoints); P. Carlen, *Magistrates Justice* (1976) (London, Martin Robertson); D. J. McBarnet, *Conviction: Law, The State and the Construction of Justice* (1981) (London, Macmillan)

²⁹ Tomasic (1985) *op. cit.* 76.

³⁰ *Ibid.*

³¹ J. Thibaut and L. Walker, *Procedural Justice: A Psychological Analysis* (1975) (New York, John Wiley and Sons).

³² R. M. Hayden and J. K. Anderson, 'On the Evaluation of Procedural systems in Laboratory Experiments: A Critique of Thibaut and Walker' (1979) (3(1-2) *Law and Human Behavior* 21-38.

³³ Tomasic (1985) *op. cit.* 78-79.

Some researchers, such as Ritzer,³⁴ have advocated the bridging of these different paradigms. However, constructing such philosophical bridges is easier said than done. As Atkinson and Drew³⁵ point out,

there is still profound disagreement within social sciences in general, and sociology in particular, about fundamental theoretical and methodological problems concerning the nature of the social order, and how it is to be studied, described and explained.

Because of this diversity in approaches to the study of such institutions as Courts, it is important that Court researchers lay bare the assumptions upon which a particular study is based and openly acknowledge that there is little or no consensus amongst scholars of which theoretical constructs and supporting methodology are 'to be regarded as generally acceptable' and therefore valid.³⁶ Tomasic³⁷ observes that a theoretical consensus may never be attained and it may be easier, and some suggest more desirable, to utilise what has been termed 'triangulation' - the concurrent use of a number of paradigms. Triangulation involves the employment of a variety of different measures or data collection techniques in order to examine the same social variable from different perspectives.³⁸ Multiple indicators, multiple approaches, are utilised in the assumption that one is more likely to get a truer picture of the reality being studied.³⁹ This is the broad approach adopted in the present study and described in the next section.

³⁴ G. Ritzer, *Sociology: A Multiple Paradigm Science* (1975) (Boston, Allyn & Bacon) at 223.

³⁵ J. M. Atkinson and P. Drew, *Order in Court: the Organisation of Verbal Interaction in Judicial Settings* (1979) (Atlantic Highlands, NJ, Humanities Press) at 4.

³⁶ *Ibid* 15-16 cited in Tomasic (1985), *op. cit.* at 78; See also R. Ingleby, *In the Ball Park: Alternative Dispute Resolution and the Courts* (1991) (Carlton South, Victoria, Australian Institute of Judicial Administration), at 5-8.

³⁷ Tomasic (1985) *op. cit.* 68.

³⁸ W. L. Neuman, *Social Research Methods* (1991) (Boston, Allyn and Bacon) at 138. Triangulation comes from surveying. 'Surveyors measure the distances between objects and survey the landscape by viewing points from different angles. . ' (at 137-38).

³⁹ *Ibid.*

5.3 Rationale of the Tasmanian Small Claims Court Study

The major focus of this evaluation has been to preserve and improve upon the benefits of the Small Claims system in Tasmania. After surveying recent developments in judicial administration, previous Small Claims studies, and the history and development of government or public program evaluation generally,⁴⁰ a number of criteria emerged which formed the rationale behind the present evaluation of the Tasmanian Small Claims Court.⁴¹

Firstly, because the Tasmanian Small Claims Court had not been previously studied it was desirable to conduct a broad evaluation of the system as a whole, to be followed in later years by systematic, on-going evaluations of particular facets of the system. In order to conduct a comprehensive evaluation of the Small Claims system, it was important that the evaluation be 'multiple'⁴² 'holistic'⁴³ and contextual⁴⁴. This is because the Small Claims Court represents a drama with diverse actors - citizens, disputants, Magistrates, Registrars, counter staff, consumer groups, traders, legislators, and policy makers - who all contribute particular perspectives and diverse criteria by which they view the Small Claims Court. As Majone observed: 'This variety of viewpoints is not only unavoidable in a pluralistic society; it is also necessary to the vitality of a system of government by discussion.'⁴⁵ And as Cameron⁴⁶ suggests, 'methodological diversity is not just

⁴⁰ J. Cameron, 'Evaluating the "Quality of Justice" Provided by the Christchurch Community Mediation Service' in J. Mugford (ed), *Alternative Dispute Resolution* (July 1986) (AIC Seminar: Proceedings No. 15, (Canberra, ACT, Australian Institute of Criminology) 151, 154.

⁴¹ These issues are discussed in some detail in Chapter 4.

⁴² G. Majone, *Evidence, Argument and Persuasion in the Policy Process* (1989) (New Haven, Yale University) 169.

⁴³ See generally M. Franaszek, 'Justice and the Reduction of Litigation Cost: A Different Perspective' (1985) 37 *Rutgers Law Review* 337.

⁴⁴ See H. Jacob, 'Courts as Organizations' in K. O. Boyum and L. Mather (eds) *Empirical Theories About Courts* (1983) (NY, Longman) 191-215 (Jacob points out that while we now know a great deal about the inner workings of many of our courts, there is still little known about the broader impact of our judicial system on society.)

⁴⁵ *Ibid* 9; see also J. Cameron, 'Evaluating the "Quality of Justice" Provided by the Christchurch Community Mediation Service' in J. Mugford (ed), *Alternative Dispute Resolution* (July 1986) AIC Seminar: Proceedings No. 15, (Canberra, ACT, Australian Institute of Criminology) 151 ('Because the range of goals of an evaluation might be wide, such research [evaluation research] must incorporate a variety of methods. Research methods employed in evaluation research range from participant-observation and ethnography to secondary statistical analysis and archival searches, from simulation modelling to social indicator analysis, at 154-55).

desirable but is a necessary component of evaluation research.' By such multiple policy evaluation the actors may become more aware of each other's perspectives and are able:

to reach a level of understanding and appreciation that is more than the sum of the separate evaluations. The purpose is not to construct a grand model that would combine all the partial perspectives into one general criterion of good policy--a weighted average, as it were, of equity, effectiveness, legality, and any other relevant standard--but to contribute to a shared understanding of the multiple perspectives involved.⁴⁷

Thus, it was necessary to examine Small Claims not only from the perspective of the litigants, claimants and respondents, who utilised the system, but also to consider the views of Commissioners, Magistrates, Court staff, and related community groups, such as Consumer Affairs and Legal Aid, which form part of the wider network of dispute resolution of which the Small Claims is but a part.

Secondly, the adoption of a multiple approach required the utilisation of varied and diverse measures - both quantitative and qualitative⁴⁸ - which would take into account the multi-faceted reality of a Small Claims Court.⁴⁹ Such an approach contrasts with previous studies⁵⁰ of Small Claims Courts and Tribunals in Australia, most of which have been descriptive rather than empirical, and have focused on the various procedural aspects of the Small Claims system. Moreover, the few Australian empirical studies⁵¹ which have been conducted on Small Claims

⁴⁶ Majone, *op. cit.* 155.

⁴⁷ *Ibid.* See generally G. Ritzer, *Sociology: A Multiple Paradigm Science* (1975) (Boston, Allyn & Bacon); W. L. Neuman, *Social Research Methods* (1991) (Boston, Allyn and Bacon).

⁴⁸ See generally, E. Gummesson, *Qualitative Methods in Management Research* (1991) (London, Sage); M. Q. Patton, *Qualitative Evaluation and Research Methods* (2nd edn) (1990) (London, Sage); C. Marshall and G. B. Rossman, *Designing Qualitative Research* (1989) (London, Sage); A. M. Strauss and J. Corbin, *Basics of Qualitative Research* (1990) (London, Sage); J. Van Maanen, *Qualitative Methodology* (1983) (London, Sage).

⁴⁹ See J. Brewer and A. Hunter, *Multimethod Research: A Synthesis of Styles* (1989) (London, Sage).

⁵⁰ These issues are discussed in some detail in Chapter 2 of this thesis.

⁵¹ *Ibid.*

lacked comprehensiveness in that they focused on claimants only or a particular aspect of the Small Claims system without relating it sufficiently to the system as a whole.

Thirdly, evaluation is central to decision making and serves a wide range of purposes ranging from decision making tools, feedback, better use of resources, accountability and public relations.⁵² A major purpose for which the present evaluation was undertaken was to provide useful information to management and policy makers by which the Tasmanian Small Claims system might be assessed. It is also important that this evaluation not be seen as an end in itself. Rather, regular and systematic evaluation should be an integral part of sound judicial administration. This does not mean, however, that the Small Claims Court should undergo a comprehensive 'total program' evaluation each year. More appropriately, the present study is seen as laying the foundation for what will be an on-going and systematic evaluation of the Tasmanian Small Claims system.

Fourthly, as Newcomer and Wholey⁵³ point out, a common feature of successful evaluations is that evaluators work with managers and staff to convince them of the need for systematic evaluation. A major feature of the present study, and a key factor in its success, has been the cooperation and support which, at all stages, the researcher received from all the people involved (stakeholders) who had a genuine interest in assessing the existing program with a view to finding out how it might be improved.

Fifthly, not only should program stakeholders support and be informed about the evaluation, they must be involved throughout evaluation design, implementation and reporting. It is important to stress that the communication must be on-going. Early communication especially, represents the evaluator's opportunity to be an advocate for the evaluation, selling stakeholders on the necessity, workability, and desirability of the evaluation.⁵⁴ Thus, the active involvement and participation of

⁵² See generally, W. Shadish, et al, *Foundations of Program Evaluation: Theories of Practice* (1991) (London, Sage); R. Conner (ed), *Methodological Advances in Evaluation Research* (1981) (California, Sage).

⁵³ K. E. Newcomer and J. S. Wholey, 'Evaluation Strategies for Building High Performance Programs' in J. S. Wholey et al, *Improving Government Performance* (1989) (San Francisco, Jossey-Bass) 195-208.

⁵⁴ E. N. Goldenberg, 'The Three Faces of Evaluation' (1983) 2(4) *Journal of Policy Analyses and Management* 515-525.

Court staff, justice department policy makers and supporting groups such as Consumer Affairs was an integral feature of the study.

Sixthly, a corollary of the previous point is that evaluators must work with managers to ensure that the best evaluation design matches or fits the characteristics of the department, entity or system being evaluated. Insufficient deliberation about design increases the likelihood of false pictures of the program. Accordingly, evaluators should articulate the reasoning behind design choices and justify the data collection techniques employed by the evaluator. Again, the researcher consulted actively and widely with all parties who were involved with Small Claims in Tasmania. The design of the evaluation and all instruments, such as the disputants' survey, were circulated widely for comment and critical appraisal. Also, the preliminary report of findings was circulated widely to Registrars, Magistrates, selected lawyers, consumer groups and other advisory bodies so that they could help validate the data and assist in its interpretation. Indeed, their detailed and insightful comments proved an invaluable aid to the analysis of results.

Seventhly, prior to the evaluation, evaluators should devise a strategy for testing the validity of the data they collect.⁵⁵ This was accomplished in the present study by wide consultation, as mentioned above. In addition, the researcher at an early stage observed approximately fifty (50) Small Claims hearings and conducted a pilot survey to ascertain what types of information might be collected in the comprehensive survey which followed. Additional pilot surveys were conducted on the final survey instruments and early returns were shared with key people to ensure that the information being collected was both relevant and useful. As a further check on the validity of instruments and the usefulness of information likely to be derived from them, the researcher also had the benefit of previous studies conducted in New Zealand, England and the United States. The New Zealand Justice Department was most generous in allowing the researcher to utilise a modified form its survey instruments. The New Zealand questionnaires had proved to be very useful in the Justice Department's evaluation of the New Zealand Small Claims Tribunal, which in most respects is similar to the Tasmanian Small Claims Court. This research strategy also enabled the researcher to compare the findings of the present study with similar studies conducted in other countries.⁵⁶ Finally, one benefit of utilising a mix of quantitative and qualitative data is that the variety of

⁵⁵ Newcomer and Wholey, *op. cit.* 202.

⁵⁶ These comparisons are documented in the Presentation and Analysis of Results.

such measures acts as a check and balance on each other as well as enabling the researcher to explore facets of the Small Claims system which could not have been revealed by reliance solely on either quantitative or qualitative methods.

An eighth factor in framing the research methodology was the realisation that evaluators must be sensitive to timing, particularly in regard to deadlines imposed upon management.⁵⁷ Such sensitivity minimises the problems caused by the fact the system being evaluated is also continually changing. Though the Tasmanian Small Claims Court has been operational since September 1985, the researcher, in consultation with Court staff, chose to concentrate on the 1989 Fiscal year. This was done for the following reasons: 1) a higher response rate and more accurate reflection for disputant questionnaires were more likely if the time period was as close as possible to the culmination of the disputant's case; 2) greater reliability of results was also likely to be achieved by collecting a large body of data over a limited period of time (one year), rather than thinly spread data over a period of five years; 3) there were significant procedural amendments to the Small Claims legislation in 1987, thus it would have necessitated the differentiation of results for the old from the new procedure; and 4) because a major part of the study was to suggest improvements to the Tasmanian Small Claims system and aid future planning, it was desirable to focus on the present day operation of the Court.

A ninth factor which was considered in the present evaluation of the Tasmanian Small Claims system was the importance of local legal culture,⁵⁸ an aspect which has been the focus of several alternative dispute resolution studies have concentrated on the role played by local legal culture in the receptivity of the legal profession to various dispute resolution innovations.⁵⁹ Accordingly, to 'get a feel' of the local legal culture, the researcher travelled throughout the State to talk with Court officials and supporting groups such as Consumer Affairs and to observe and examine the Small Claims Court in operation in various localities. Although research budget and time considerations prevented local variations from being a major focus of the study, such variations were considered and proved to be

⁵⁷ Newcomber and Wholey, *op. cit.* 198.

⁵⁸ R. Ingleby, *op. cit.* 6.

⁵⁹ Ingleby, *op. cit.* citing J.A. Wall and D.E. Rude, 'Judges' Mediation of Settlement Negotiation' (1987) 72 *Journal of Applied Psychology* 234-39; J. Mastrofski and R. Ritti, 'Personal, Organizational and Environmental Factors Influencing Judges' Preferences for Mediation versus Litigation' (1988) 16 *Policy Studies Journal* 663-86.

important in some aspects of Court procedure, for example the enforcement of judgments.

Finally, Barkdoll and Sporn⁶⁰ highlight the fact that evaluators must be flexible and creative throughout the evaluation process. This is because program environments are continually changing. Resource levels, political leadership, key stakeholders etc may change while the information is being collected, thus making the evaluator's task more difficult. Also, the system being evaluated will often change as a result of feedback received during the process of evaluation itself. Just to take one example, as a result of the researcher's travels throughout the State, it was discovered that the Small Claims Court Registrar in Burnie enjoyed a very high enforcement compliance because of his practice of sending a letter from the Court (and on behalf of the winning party) to the judgment debtor reminding the debtor about the importance of compliance with the law. This practice, once known, was soon adopted in every Small Claims Court in the State. Another result of this incident was that the Chief Administrator of Courts realised the need for more frequent meetings amongst Small Claims administrators in each region of the State. Accordingly, this feature of evaluation practice has necessitated at times some adjustments in methodology and reporting and recommendations, but this is not unusual nor unexpected.

5.4 Methodological Components.

Based upon the above rationale, the present evaluation involved the following separate, but related components:

i) Review of the literature and preliminary interviews with key people.

The first component involved a review of the Tasmanian legislation and its history, and the available literature on Small Claims Courts and Tribunals in Australia and overseas. Preliminary interviews were also conducted with 'key' people including Mr John Ramsay, Head of the Law Department, and Deputy Head, Mr Richard Bingham; Mr Andrew Hemming, the principal Magistrate in charge of hearing most small claims throughout the State, and Mr Walter Worsey, Registrar, and Mr Barry Hamilton, Deputy Registrar two of the principals involved in establishing the Tasmanian Small Claims Court.

⁶⁰ G. Barkdoll and D. L. Sporn, 'Five Strategies for Successful In-House Evaluations' (1989) in J. S. Wholey et al, *Improving Government Performance: Evaluation for Strengthening Public Agencies and Programs* (San Francisco, Jossey-Bass) 30-48.

ii) *Field Work: personal and participant observations.*

Overlapping with the first component, the researcher personally observed, over the course of several weeks, approximately fifty Small claims trials. The purpose of these non-participant observations was threefold: a) to examine the physical setting (acoustics, informality, amenities, etc); b) to ascertain how the Small Claims system worked in practice; c) to visit informally with the sitting Magistrates and litigants in order to ascertain particular areas which would become the focus of a formal survey which was to be conducted at a later date. In all these cases, the researcher's role was declared.

Though not planned as part of the original methodology, the researcher also engaged in participant observation when involved in his own case before the Tasmanian Small Claims Court.

The advantages and disadvantages of participant observation as a research methodology are succinctly summarised by Ingleby⁶¹:

The advantages of participant observation are that the data are the researcher's actual observations, rather than the official or unofficial recollections of others. If one accepts that research, as all human activity, is necessarily a value-laden process then the implication is that researchers have a duty to make their values or assumptions clear to the reader, rather than to pretend that values or assumptions do not exist The best way to do this is to ensure that the researcher is as close to the observed activity as possible, so the reader can see how the writer attempts to demonstrate the conclusions from the data. . . .

The disadvantages of participant observation are that the researcher's assumptions and values can narrow the range of activities which are observed. As a research methodology, it also suffers from the drawback of being incredibly labour-intensive in both the collection and analysis of data.

⁶¹ R. Ingleby, *In the Ball Park: Alternative Dispute Resolution and the Courts*, (1991) (Carlton South, Australian Institute of Judicial Administration) 7.

By combining participant observation with other methodologies, as discussed below, I have hopefully avoided the disadvantage of having too narrow a perspective, but admittedly added significantly to the burden of data collection and analysis.

iii) *Secondary sources: file survey.* Record keeping in the Tasmanian Small Claims Court system is done manually. Accordingly, it was necessary to compile a computer data base from existing Court files. From this information, the researcher could ascertain the identity of the parties, the nature of the claim filed, amount of time between filing of the claim and obtaining a hearing, the amount in controversy, the outcome of the case as a percentage of the final judgment, percentage of ex parte hearings and similar data. The survey included all the Hobart Small Claims files for the fiscal year 1989 and approximately one third of the files from the other regional centres, Launceston, Devonport and Burnie.

iv) *An Account from the Special Commissioner/Magistrate's point of view.* The Tasmanian Small Claims Court is serviced by one full-time Magistrate (formerly deemed 'Commissioner'), part-time Magistrates, and Magistrates from other Court Divisions who handle a large share of motor vehicle accident cases. Since its inception in September 1985, the Court has only had two full-time Commissioners, Mr Michael Hill and the present Magistrate, Mr Andrew Hemming. In-depth and multiple interviews were conducted with Mr Hill and Mr Hemming. Interviews were also conducted with several of the part-time Magistrates who assist with Small Claims.

v) *Interviews with Small Claims Court personnel.* Frequently, the most valid and useful insights about the effectiveness of a program are derived from the people who administer it. Accordingly, Court personnel, from Magistrate to clerk level, in all three regions of the State, were also interviewed. Information gathered through the personnel interviews included detailed information on Court procedures, including procedures for filing cases, conducting conferences, and enforcement of judgments, as well as the attitudes of Court personnel towards the Small Claims process.

vi) *Interviews with representatives from supporting groups.* The Small Claims Court does not operate in a vacuum. Various supporting and related groups, such as Legal Aid, Legal Referral Agencies, and Consumer Affairs, frequently deal with litigants prior to a case being heard in the Small Claims Court.

Moreover, such agencies often refer parties to the Small Claims Court when mediation has failed to resolve the dispute. These groups also receive feedback from their clients regarding the client's experience before the Court. The fourth component of the evaluative research involved interviews with key people in these supporting groups.

Interviews of support groups took three forms. Most involved semi-structured settings in which question areas were organised chronologically to reflect the different stages involved in a Small Claims action: existence of a dispute; attempts at conciliation; filing a claim; pre-hearing attempts at settlement; hearing/trial; and enforcement. The specific questions and detail varied depending upon the experience and position of the person interviewed, but the researcher attempted to cover the same areas which were the focus of the survey of disputants. In this way, some triangulation was possible and qualitative data helped to validate and further probe the results from the quantitative survey data. Many informal unstructured interviews with Court staff also took place as the researcher spent considerable time at the Small Claims Registry in computerising Small Claims records. Finally, there were two formal focus groups. One was organised and directed by the researcher and involved a panel discussion with five of the Tasmanian Consumer Affairs staff who were involved with different aspects of small claims disputes. A second focus group was organised by the Small Claims Registrar and observed by the researcher. This group involved representatives from the Tasmanian insurance companies, Consumer Affairs and the Small Claims Registrar to discuss problems associated with insurance companies (motor vehicle accident cases which now account for almost half of all claims lodged) and the Small Claims Court.

Most of the semi-structured interviews were taped and a transcript prepared and returned to the respondent for correction and/or additional comment. Most of these interviews were thirty minutes to one hour in length.

vii) *Survey of Disputants.*

a) *Questionnaire design.* 'In the end, the performance of the Tasmanian Small Claims Court must be assessed by its clients because it was established for their needs; they are most familiar with its outcomes.'⁶² In order to obtain an idea of the

⁶² M. Borrelli, *Small Claims, 'Smaller Satisfaction? An Analysis of the Small Claims Court from the Litigants' Perspective*, unpublished PhD Dissertation, Harvard University, 1989, p. 10.

types of questions which should be asked in such a survey, the researcher reviewed studies in other jurisdictions and consulted widely with Court staff, community groups and others. Several Small Claims sessions were also observed and a brief pilot questionnaire was made available to disputants for the period of one month in the Hobart Small Claims Court. Ultimately, survey questionnaires utilised previously by the New Zealand Department of Justice Study of Small Claims were adapted with changes made to accommodate them to procedures⁶³ and particular issues of concern to Tasmanian authorities.⁶⁴ The final questionnaire was piloted by being sent to a small sample of disputants who were not in the final study sample. In addition, the researcher attended several Small Claims hearings and asked disputants to complete the questionnaire in his presence. In this way, I was able to obtain some idea of the length of time required to complete the survey as well as the clarity of questions, instructions, and so on. The final questionnaire was sent to claimants and respondents drawn from a sub-sample of the file survey. These questions investigated the type of case, use of lawyers, costs of the case and convenience to disputants in pursuing their claim, attitudes toward the Small Claims process and proposed reforms, and included demographic data on the disputants.

b) Data collection. In order to achieve a manageable number of data entries, the study focused only on Court records for the 1989 fiscal year, which were examined for claimant and respondent names. Using a random starting point, the researcher chose every third name and accompanying address obtained from the Court records of all cases filed during the 1989 fiscal year. A questionnaire was posted, in which the researcher asked questions about demographic data and specific information and attitudes towards the disputants' small claim experience. The sample was also subdivided into 'contested cases'⁶⁵ and cases which settled or were dismissed prior to the hearing. Contested cases were those cases which went to the hearing stage and involved the appearance of both claimant and respondent. To encourage responses, a letter from the Law School Head of Department and a stamped return envelope were included with the questionnaires.

⁶³ For example, New Zealand has referees with no legal qualifications in contrast to Tasmania's Magistrate with full legal qualifications.

⁶⁴ For example, we were especially concerned about consumer preferences for evening and/or Saturday hearings.

⁶⁵ The term 'contested cases' was employed by Neil Vidmar to signify those cases in which both claimant and respondent appeared for the scheduled court hearing. See N. Vidmar, 'A Reconceptualization of Disputes and Empirical Investigation' (1984) 18 *Law and Society Review* 515, at 528-529.

c) *Response rates.* As indicated in Table 1 below the response rate in the Tasmanian study was higher for claimants than respondents and far higher overall for those who attended a hearing as opposed to those whose case was withdrawn or settled prior to a hearing.

For disputants who attended the hearing the response rate was very satisfactory for the claimants.(73.8%) and satisfactory for the respondents (51.8%). Considerably lower (39.4% claimants; 25.6% respondents) are the response rates for disputants whose case settled or was withdrawn prior to hearing. This too was anticipated. None of these disputants had significant contact with the Small Claims system itself. Indeed, numerous telephone conversations with several of these disputants revealed that insurance companies typically filed the claim on the disputant's behalf without the disputant being aware of it..

Table 1: Response Rates

Survey Item	Q mailed and received	Q. returned	%
Claimants attending hearing	301	222	73.8%
Respondents attend hearing	280	145	51.8%
Claimants (withdrawn/settl'd)	94	37	39.4%
Respondents (withdrawn/settl'd)	82	21	25.6%
Total: C's and R's with Hearing	581	367	63.2%
Total for all surveys	757	425	56.1%

Notes

1. These calculations are based upon contacts with potential questionnaire respondents. Those with whom contact was not made because of a change of residence, death, etc have been excluded.

The non-response rates, indicate the possibility of some bias in the final sample obtained. However, there is no way to precisely determine the exact nature of any possible bias. Often, those with little education and from lower socio-economic groupings will be less likely to respond to questionnaires and this may have occurred. This conclusion finds support in the demographic profile of those surveyed which shows that an unusually high percentage of the disputants had completed some tertiary study and held professional jobs.

d) Data compilation and analysis. This was done using the Statistical Analysis System (SAS). To examine the issue of success or failure of the Small Claims Court the survey data was divided into two major groupings: the cases in which data was available from both claimants and respondents in the same case (matched data) and those cases in which only one party returned the questionnaire. Also, for purpose of analysis the response categories were collapsed into either positive and negative categories or positive, neutral, negative categories. While such a procedure obscured some detail, this was more than compensated for in the clearer presentation of results. Next, five variables, which most clearly reflected upon user satisfaction, were chosen with comparisons made of the pairwise associations between these variables as measured by their phi coefficients.⁶⁶

viii) *Interviews with Insurance Companies.* Earlier stages of the evaluation revealed a growing incidence of motor vehicle claims involving insured parties. In fact, almost half of all claims filed in the Tasmania Small Claims Court involve motor vehicle accidents. Thus, it was necessary to interview insurance companies and their clients to ascertain any problems evolving from this aspect of the Court's operation.

Each of the components of this study provide a partial view of how well the system for resolving small claim disputes is working. Taken collectively, it is hoped they provide an integrated analysis of the features, strengths and weaknesses of the Small Claims Court in Tasmania.

5.5 Limitations of the Study

With limited time and resources, this study, like all studies, had its limitations as compromises had to be made between the ideal and the real. Constraints outside the control of the researcher dictated what was feasible, practicable and ethical. The researcher had to walk a tightrope between conducting an in-depth study and one with a wide scope while balancing quantitative and qualitative methodologies. Moreover, the pursued goal was not a stationary, but a moving target. Over the course of the three years of data collection, several changes took place in Court procedures, administration and personnel. In addition, the interaction of an evaluative researcher with the subject of the evaluation itself produces changes along the way. Finally, the criteria for measuring the 'success' of the Tasmanian

⁶⁶ The statistical methods used, results and discussion are detailed in section 6.12.5 ff.

Small Claims Court differed amongst the various participants: Magistrates, Court employees, disputants, insurance companies, legal advice groups, consumer groups and so on.

Second, the activity of evaluation also presupposes certain standards - values - upon which value judgments are being made. This means that other values, not examined as part of this study, are necessarily ignored or given undue emphasis. For example, the central focus of this study is on the perceived satisfaction of disputants with their experience before the Small Claims Court. However, satisfaction of consumers is but one success indicator. Other measures such as efficiency, effectiveness, due process of law and so on are also important.

Third, within the disputant survey itself, there are limitations. First, the use of a questionnaire means that the researcher directed the attention of the disputant to certain factors deemed by the researcher to be important. However, it is possible that other issues were ignored which were important, but not asked about. Also, the fact that the survey instrument was answered some time (in some cases months) after the dispute was concluded also introduces a measure of unreliability regarding accuracy of responses. Furthermore, the responses were given only after the disputant knew the outcome of the hearing, and there is little doubt that such knowledge would obviously 'flavour' the response to particular questions such as 'fairness' and 'satisfaction'. Finally, for many disputants answering the questionnaire, many months or even a year would have elapsed since the date of their Small Claims hearing, thus resulting in some memory blurring and loss.

Fourth, the study lacks a comprehensive comparative base. The literature survey and presentation and analysis of results cross-reference other leading empirical studies. Ideally, however, a comprehensive survey of every Small Claims Court or Tribunal in Australia would help elucidate which features of Small Claims procedure seem to work best. Satisfaction rates and perceptions of privacy, informality, fairness etc would be more meaningful if we also knew how these responses compared to disputants before the more formal Court of Requests or even more formal Supreme Court of Tasmania. Given the limited resources available for the present study, and mindful of the desirability of examining one Court in detail as opposed to making gross generalisations about Courts which are

fundamentally different,⁶⁷ the researcher was constrained in his ability to conduct a truly comparative analysis.

Fifth, while the study reports the views of those who are known to have found their way to the Small Claims Court, the researcher can only speculate about the people who did not make it to the Small Claims Court, and about those who did not respond to the survey. Accordingly, although some qualitative evidence was obtained from interviews an omnibus survey would have helped more precisely to determine the extent to which Tasmanians are generally aware of the Tasmanian Small Claims Court and their evaluation of its success.

These limitations notwithstanding, the holistic yet detailed nature of the present study, will hopefully add to our knowledge, especially in Australia, of the efficacy of legal mechanisms, such as Small Claims Courts and Tribunals, designed to handle minor civil disputes. Moreover, the practical nature of this work and the issues and discussion raised herein may contribute to our theoretical knowledge which is still somewhat primitive despite the good body of official statistics on the work of the Courts.⁶⁸

⁶⁷ Jacob, *op. cit.* 417. See generally L. M. Friedman, 'Courts Over time: A Survey of Theories and Research' in Boyum and Mather, *op. cit.* ; L. M. Friedman and R. Percival, *The Roots of Justice* (1981) (Chapel Hill, University of North Carolina Press).

⁶⁸ Tomasic (1985), *op. cit.* 55.

Chapter 6

PRESENTATION AND ANALYSIS OF RESULTS

6.1 Introduction

This chapter presents and analyses the results of the evaluation with emphasis on the project's two main empirical research activities--the survey of disputants¹ and file survey² of Small Claims records. The qualitative data from interviews³ and observations are also incorporated where appropriate to illuminate particular aspects of the Small Claims Court operation. The information collected from these research activities covered all aspects of the Small Claims process, including the patterns of usage and the perceptions of disputants, Court staff and community advice groups such as Consumer Affairs, Legal Aid and the Hobart Community Legal Service.

Although not strictly comparative in nature, this chapter makes liberal references to previous Small Claims research in other jurisdictions. This is done in order to aid and validate the analysis of the Tasmanian experience and to place the Tasmanian Small Claims Court within a wider context of similar developments elsewhere. The analysis draws especially on four major empirical studies which are exemplary for their thoroughness and insightful discussion. First is the nationwide New Zealand empirical study⁴ conducted by the New Zealand Justice Department in 1986. To help validate the Tasmanian questionnaire and to make more direct comparisons the author, with permission, adapted their questionnaire for use in the present study. The New Zealand procedure is, in most respects, similar to Tasmania's, with the interesting exception that the Court is presided over by a Referee who is not required to be legally qualified, while the Tasmanian system uses a legally qualified Magistrate.

¹ See Appendix C (1-7) for methodological details of the Survey of Disputants.

² See Appendix D for a discussion of methodology for the File Survey.

³ See Appendix E for a Summary of Interviews and discussion of methodology.

⁴ Hereafter 'NZ Study'.

The second study is deVaus'⁵ empirical work on the Victorian Small Claims Tribunal. This study was chosen first because Tasmania in setting up its Small Claims Court, adopted many provisions of the Victorian system which as a result has many features which are similar to Tasmania's. There is the important and interesting distinction, however, that Victoria has a tribunal as opposed to a Court. Secondly, it is a recent study (1986) and the only previous significant empirical work on Small Claims in Australia.

The large scale comparative study by Weller and Ruhnka⁶ of fifteen US Small Claims Courts in several states is the third study. It was chosen because of its comparative aspect, exhaustive analysis and the fact that it is one of the most frequently referenced studies done to date on Small Claims.

Fourth, comparisons are drawn from a very recent (1990) statewide study of Iowa Small Claims Courts.⁷ This study was chosen because of its recency, the fact that it was also a study of a statewide system with a jurisdictional limit of \$2000 and other features similar to Tasmania. There is the important difference, however, that in the Iowa system, lawyers are allowed to participate.

Finally, the researcher makes occasional references to an earlier Tasmanian file survey of Small Claims cases by Barry Hamilton,⁸ Hobart's first Small Claims Registrar, as well as to a very recent study by Richard Ingleby of the University of Melbourne which focuses on the relationship between alternative dispute resolution and Courts.⁹

⁵ D. deVaus, 'The Small Claims Tribunal in Victoria: an Empirical Study', A Report Prepared for the Ministry of Consumer Affairs, July 1986 (hereafter 'deVaus').

⁶ J. C. Ruhnka and S. Weller, *Small Claims Court: A National Examination* (1978) (Williamsburgh, Virginia, National Center for State Courts) (hereafter 'Ruhnka and Weller').

⁷ S. Elwell and C. D. Carlson, 'The Iowa Small Claims Court: An Empirical Analysis' (1990) 75(2) *Iowa Law Review* 433.(hereafter 'Iowa Study')

⁸ B. Hamilton, Small Claims Report, survey of small claims filed during 1985-86, Hobart, 1986 (unpublished).

⁹ R. Ingleby, *In the Ball Park: Alternative Dispute Resolution and the Courts* (1991) (South Carlton, Victoria, Australian Institute of Judicial Administration).

The presentation and analysis of results is organised according to the discernible and chronologically ordered steps in the Small Claims process. Section two discusses the goals and purposes of the Tasmanian Small Claims Court. Section three examines the question of 'access' and how people come to know about Small Claims. Section four examines various matters related to the filing of the claim, transfer of cases from the Court of Requests and joinder of parties. Section five describes the nature of disputes which are brought to Small Claims. Pre-trial matters - dismissals, Registrar's conferences, settlements, etc are covered in section six, while the hearing itself is discussed and analysed in section seven. Section eight considers how convenient it was for disputants to attend the hearing. Section nine discusses the outcome of Small Claims hearings. Section ten deals with matters occurring after the hearing such as problems of enforcement. Section eleven looks at the demographic characteristics of those disputants who attended the hearing. Section twelve assesses the overall opinion about the effectiveness of the Tasmanian Small Claims Court. Finally, section thirteen delves into questions related to Small Claims Court administration as a whole.

6.2 Purpose and Goals of the Tasmanian Small Claims Court

Consistent with the general historical evolution of and rationale for Small Claims Courts and Tribunals presented in earlier chapters, all of those interviewed (Referees, Court staff, community groups and individuals) stressed that the major purpose of Tasmanian Small Claims Court is to provide for the inexpensive, speedy and informal resolution of disputes.

For example, Mr Peter Maloney,¹⁰ Director of Legislation and Policy in the Department of Justice, and one of the principal founders and drafters of the Tasmanian Small Claims legislation, stated:

The philosophy [of the Small Claims Court] was to provide a cheap, speedy procedure for the resolution of small disputes generally.

¹⁰ Personal Communication via a formal interview on 22 March 1991 together with several informal discussions on other occasions. See generally Summary of Interviews, s 3ff, Appendix E.

Magistrate Hemming,¹¹ Tasmania's current full-time Small Claims Magistrate, emphasised the role of Small Claims in giving the ordinary person access to the judicial system in minor disputes.

[I]t [Small Claims] provides a low cost accessible forum for people who want to settle their very real personal disputes they have with other members of the general public without the need of necessarily going through a rigid Court procedure to do it.

Tasmania's first full-time Small Claims Magistrate and one of the drafters of the original legislation, Michael Hill,¹² put it this way: 'This jurisdiction (Small Claims) can really rattle the cases through and that's what it is all about - expedient, quick justice.' This apparent 'uniformity of purpose, however, is illusionary when one considers that various groups have different expectations regarding the Court's performance and that achieving the goals of efficiency and procedural due process are, in practice, often in conflict with each other.

6.3 Access to Justice Issues and the Small Claims Court

6.3.1 In General

'An important goal of many justice systems is the provision of "access to justice".¹³ Similarly, increased access to justice for small civil disputes is one of the major aims of the Small Claims Court. This section will deal with public awareness and convenience issues related to access to justice. These include the removal of financial barriers, scheduling hearings at convenient times, accommodation of the multi-cultural needs of disputants and so on. Later sections will consider in detail the procedural aspects of access, such as restrictions on lawyers, privacy of hearing, opportunity to present one's case and the importance of an informal, unintimidating setting.

11 *Ibid.*

12 *Ibid.*

13 D. McGillis, *Community Dispute Resolution Programs and Public Policy* (1986) (National Institute of Justice, US Department of Justice, Washington, D.C.) at 85.

A necessary precondition to the achievement of access to justice is an awareness by the disputant that the Small Claims Court exists.¹⁴ Having the best system in the world will be of little avail if people do not know about it. Mr Barry Hamilton,¹⁵ one of the co-founders of the Small Claims Court in Tasmania, felt that when it was first established the existence of the Small Claims Court was well publicised. The first full time Special Commissioner (now Magistrate) for Small Claims, Mr Michael Hill, played a pivotal role in educating the community about the existence of the Small Claims Court.

Question: Do you think Small Claims should be advertised more, for example, you mentioned speaking to various community groups?

Answer: Definitely so. I know I visited all the Rotary clubs. I remember speaking to one group as small as 6 in Lindisfarne (a number of business people were thinking of using the Court to pump through their debt collections and I talked them out of that. It was before the Act was amended to require a dispute) and another meeting of 140 + at the Hobart Rotary Club. ... They were very important PR exercises.¹⁶

Mr David England,¹⁷ the chief Court administrator, Magistrate Hemming¹⁸ and Court staff generally felt that after five years of operating, the Tasmanian

14 Several Small Claims studies have documented the public unfamiliarity with the existence of Small Claims. See D. Caplovitz, *The Poor Pay More* (1967) publisher at 175 (64% of consumers indicated they did not know where to go for help to redress complaints against traders); Small Claims Court Study Group, National Institute for Consumer Justice, *Little Injustices: Small Claims Courts and the American Consumer* (1972) (Public knowledge of Small Claims Court existence was "extremely low" at 46-62); Note, 'The Persecution and Intimidation of the Low-Income Litigant as Performed by the Small Claims Court in California', (1969) 21 *Stan. L. Rev* 1657, at 1662 (average poor person unaware of existence of Small Claims); Weller and Ruhnka, *op. cit.* 99-101.

15 Personal Communication, 6 February 1990 and on numerous other occasions. See Summary of Interviews *op. cit.* s 4.

16 Personal communication, 7 February 1991. See Summary of Interviews, *op. cit.* s 3.

17 Personal communication, 17 January 1990 and on numerous other occasions. See Summary of Interviews, *op. cit.* s 4.

community was becoming generally aware of the existence of Small Claims. When asked how people found out about the Small Claims Court, the response was 'by word of mouth' and by referrals from such groups as insurance companies, Legal Aid and Consumer Affairs. Mr Hamilton¹⁹ also noted that 'Small Claims' was advertised in the phone book under department headings and that a notice board was occasionally put up in various seminars and conferences. He stated that the Small Claims Court was also well known amongst legal practitioners, the Consumer Affairs Department, and the people who work in the Court structure generally.²⁰ While the public is becoming more aware of the existence of Small Claims Court, most Magistrates²¹ nevertheless agreed that even more publicity was needed, though a caveat was expressed that the resources of the system were already under significant strain. Interestingly, the supporting groups such as Consumer Affairs²² and Hobart Community Legal Service²³ universally thought that Small Claims was not sufficiently publicised. Compared to Small Claims Magistrates and Court staff, the supporting groups were more adamant that greater publicity was required.

6.3.2 Awareness of Small Claims Procedures

Even if people know of the existence of Small Claims Court, they may hesitate to use it if they are uneducated about its procedures.²⁴ Thus, related to the issue of general public awareness of Small Claims, is the need, in a forum where people conduct their own case, for accurate information about Small Claims procedures. All of the interviewed Magistrates²⁵ agreed that the more

18 Personal communication, 25 October 1989 and on numerous other occasions. See Summary of Interviews, *op. cit.* s 3.

19 Personal communication, *op. cit.*

20 *Ibid.*

21 See e.g., Interview of Magistrate Michael Hill, Summary of Interviews, *op. cit.* s 3.

22 Summary of Interviews, *op. cit.* s 5.

23 *Ibid.*

24 See e.g. Massachusetts Public Interest Group, Inc., *The Plight of the People's Court: An Analysis of Massachusetts Small Claims Court* (1982) (Boston, Massachusetts Public Interest Research Group, Inc) (only 26% of Small Claims plaintiffs knew about the availability of Small Claims prior to the time their case arose). However, in the NZ Study, 61% of disputants of those surveyed were aware of the 'concept of Small Claims Courts', Chapter 2, p. 3).

25 See e.g., personal communication with Magistrate Hemming, Summary of Interviews, *op. cit.* s. 3.

prepared people are, the better the Small Claims Court can function and carry out its goal of providing affordable, speedy and fair dispute resolution.. The theme of access to justice was further elaborated upon by Russell Viney,²⁶ District Registrar of Small Claims in Burnie:

I think one of the real advantages is that it [Small Claims Court] gives people easier access to the Court, quicker access rather than the sometimes cumbersome procedures through the Court of Requests. We are able to give people a certain amount of advice with their small claims, whereas we are very limited with what we can tell them, the documents we can assist them with in the Court of Requests. Very very seldom, would anyone in the Court of Requests file their own claim and summons, for instance. I think the real purpose of Small Claims is to give people easy access. When they know that the hearing is only going to be between the parties involved, no solicitors around, it seem to give them a little confidence; they know they are there on equal terms.

Magistrates and Court officials pointed to the existence of a Small Claims booklet available to disputants in Small Claims cases.²⁷ Court staff pointed out that the booklet has undergone several changes and been steadily improved, though further modifications are required.²⁸ Consumer Affairs²⁹ and Hobart

²⁶ Personal communication on 16 March, 1990. See Summary of Interviews, *op. cit.* s 5.

²⁷ Personal communication with Small Claims Court Staff at various times during 1990-91. See e.g., Interview with Registrar, Mr Paul Huxtable, Summary of Interviews, *op. cit.* s 4.

²⁸ Weller and Ruhnka, *op. cit.* 69, indicate that a Small Claims booklet: should include basic information on Court rules and procedures, information for claimants on how to determine which respondents to sue, information for respondents on how to answer if required, type of evidence required at trial. It should also include names, addresses and phone numbers of persons who can answer questions, or provide further assistance. Respondents should be told of their right to request instalment payment of judgments or question elements of a transaction even though they think they owe the money, and they should be encouraged to appear.

²⁹ See Focus Group Interview with several officers of Consumer Affairs on 5 July 1990. See Summary of Interviews, *op. cit.* s 5.

Community Legal Service³⁰ were of the view that the booklet was inadequate in these respects: 1) parties do not appreciate the importance of witnesses, and of detailed statutory declarations; 2) disputants do not realise that in dealing with a trader that they must sue the person who owns the business, and that a business name will often not be a legal entity. Many consumers do not realise that they need to go to Corporate Affairs and find out the person who owns the business; and 3) people do not understand the enforcement process, nor do they realise that they will not be able to recover the cost of witnesses.

In addition, several of the respondents commented on their returned questionnaires that the Small Claims booklet was 'biased in favour of claimants'. These disputant comments were corroborated by the results of the disputants survey which found that only 10% of claimants stated they were unprepared. In contrast approximately one third of the respondents stated that they were unprepared for their Small Claims Hearing.³¹ Also, almost a quarter of claimants and a third of respondents stated they did not know before the hearing that they could bring witnesses;³² and 40% of the disputants stated that they did not know that there was no right of appeal against a decision of the Small Claims Court.³³ These figures suggest the need of more information about Small Claims, especially on the part of respondents.

As in the case of the need for more publicity, agencies such as Consumer Affairs and Hobart Community Legal Service were more critical than Court staff of the degree of community knowledge about Small Claims procedures.³⁴ For example, Mr Marron³⁵ (Hobart Community Legal Service) observed:

30 See Summary of Interviews, *op. cit.*

31 See Table 39 in Section 5 of this chapter. See also the NZ Study, at 15-16 (the figures are almost the same as Tasmania's).

32 See Table 48 and discussion in section 7 of this chapter.

33 See Table 82 and discussion in section 10 of this chapter.

34 For a detailed analysis of the general need for more access to legal advice see A. Mackirdy, *A Community Legal Centre for Tasmania* (1986) Unpublished LLM Thesis, University of Tasmania; see also, E. Dean and D. Quarmby *Legal Aid Services for Tasmania* (1977) (Department of Social Work, TCAE, Hobart); A. McIntosh and C. McCleod, *An Investigation into the Legal Needs of Bridgewater* (1981) Unpublished study, Law and Society Unit, University of Tasmania.

35 Personal communication, 23 July, 1990 and 9 August 1990 see Summary of Interviews, *op. cit.* s 5.

The Court also needs to be "de-mystified". . . . People need to understand not only the role of the Court but the workings of the Court so that more will use it and use it more effectively.

As it stands now, on the day of the hearing people often do not have their evidence assembled, they haven't prepared properly, they have no idea of the rules of evidence. Even though formal rules are suspended many litigants do not understand the basic rules which do exist. For example when the Commissioner says they can cross-examine, many think that means they present their own case. There needs to be a lot more education about the roles and procedures operating in the Court.

6.3.3 Psychological Access

In addition to the 'cognitive' element of knowledge that the Small Claims Court exists and awareness of its procedures, there is another element of access which relates to more 'affective', psychological, barriers which prevent some people from going to a 'Court' to resolve their disputes. Accordingly, many of the features of the Small Claims Court--its informality, privacy, removal of strict rules of evidence, absence of lawyers, etc--are designed to enable disputants to feel relaxed and confident enough to conduct their own cases. The importance of empowering people, giving them confidence in conducting their own Small Claims Court cases was reinforced by Magistrate Hill³⁶ when addressing the importance of the Magistrate speaking at Rotary Clubs and other community groups:

They were very important PR exercises. I distributed pamphlets, gave out copies of the forms and told them how the Court worked. It is very important for people to feel that they can do it themselves, to get the perception that they can do it.

³⁶ Personal communication with Magistrate Hill, Summary of Interviews *op. cit.* s 3.

If they just hear the words "Small Claims Court" they might be intimidated. But if they hear the average claim is 30-40 minutes (about the same as a dentist-sometimes more painful, sometimes less) and both sides just tell their story, no fisticuffs and you can ask questions of each other, and at the end of the day I say "you win, you lose"--they get a perception that it is their Court. If you can keep it simple, they get attracted to it. If you don't sell it, people fade away and don't use it.

6.3.4 Access for Particular Groups

An examination of access issues must also account for the utilisation of the system by particular groups within the community.

Accessibility for Migrant Groups

If access is to be more than symbolic, the Court needs to stay in touch with the diverse groups who are touched by Small Claims and for whom their most likely experience with the Legal system will be in a Small Claims Court. Moreover, it is in light of their experience in Small Claims Court that most citizens will form their perceptions of the judicial system as a whole. Court officials also need to be open to the fact that different people and groups see reality differently. This explains much of the contrast between the views of Court staff, the supporting groups such as consumer affairs and legal advice services, Magistrates and the disputants themselves.³⁷

For those disputants from a non-English speaking and non-Anglo-Saxon background, the prospect of going to Court can seem particularly daunting. Accordingly, previous studies have highlighted the need for Courts to be especially aware of the special problems of such disputants.³⁸ However, there

³⁷ Lieberman for one talks of the 'traditionalist' view of Courts as legal decision makers versus the 'adaptationist view' of Courts as agents of conflict resolution and social welfare. J. Lieberman (ed), *The Role of Courts in American Society* (1984) (St Paul Minnesota, West Publishing Company) at 83-86. These different roles are also seen in the disputant comments, some stating that they wanted the judge to make a decision, others to reach an agreement.

³⁸ See e.g., Ruhnka and Weller, Chapters 5 and 8; J. Y. King, 'Small Claims Practice in the United States' (1977) 52 *St John's Law Review* 52; California Department of Consumer Affairs, *The Small Claims Court Experimental Project: A Report to the*

does not appear to be a problem in Court access for migrants in Tasmania because, in contrast to most Australian states, Tasmania has a low percentage of non-English speaking migrants. It was the unanimous opinion of all those whom the researcher surveyed³⁹ that migrants, especially non-English speaking migrants, enjoyed ready access to the Small Claims Court. in Tasmania. The validity of these opinions is supported by the demographic characteristics of those surveyed which reflect approximately the same proportion of migrants which exists in the general population (see Tables 2 and 3 below).

Table 2: Birthplace /Nationality of Claimants

Response	Freq	%
Australia	124	80.0%
Europe	1	0.6%
UK	13	8.4%
Poland	2	1.3%
USA	1	0.6%
Croatia	1	0.6%
India	1	0.6%
Austria	2	1.3%
Scotland	1	0.6%
Germany	2	1.3%
Laos	1	0.6%
New Zealand	2	1.3%
Hungary	1	0.6%
Egypt	1	0.6%
Sth Africa	1	0.6%
Holland	1	0.6%

Notes

1. Base: individual claimants
2. No response or corporate litigants: 67

Table 3: Years in Australia:Claimants

Response	Freq	%
New Australian	2	5.0%
Old Australian	38	95.0%

Notes:

1. Base: individual claimants not born in Australia
2. Not applicable and No response: 181
3. New Australian= 3 years or less in Australia
4. Old Australian= greater than three years residence in Australia

Legislature on the Court Assistance Experiment (1979) (Sacramento, Department of Consumer Affairs).

39

See e.g, Personal Communication with Magistrate Hemming, Summary of Interviews, *op. cit.* s 3.

Table 4: Birthplace /Nationality of Respondents

Birthplace	Freq	%
Australia	82	83.7%
UK	5	5.1%
Czechoslovakia.	2	2.0%
Germany	2	2.0%
Holland	2	2.0%
Poland	1	1.0%
Croatia	1	1.0%
India	1	1.0%9.
Yugoslavia	1	1.0%
Ukraine	1	1.0%

Respondents Who Indicated they were not born in Australia

RESPONDENTS

Notes for Respondents

- 1. all non-Australians have been here over 5 years
- 2. Corporate respondents and no response: 47

Note that the nationality characteristics for the disputants surveyed are fairly representative of the Tasmanian population. Census (1986) figures for Tasmania show that 88.8% of the State's population were born in Australia and 4.3% in England. The percentage of population in Tasmania from any other country is less than 1%. These figures suggest that the Court is equally accessible to migrants as to native born Australians.⁴⁰ As a percentage of population, one would expect that potential problems with migrants would not be as significant an issue in Tasmania when compared to such states as Victoria and NSW where non-English speaking migrants are located in much greater numbers.

Despite the fact that Tasmania appears to have few problems in creating Small Claims access to migrants, it is nevertheless important that the Court remain vigilant in this area. For example, a few of those interviewed quickly responded that there was little problem with migrants because an interpreter was available if needed. Such a response overlooks the fact that the problems encountered by migrants are not purely linguistic; migrants are often unaware of the Australian Legal system, which in many respects is often vastly different from their own.⁴¹ Accordingly, Court staff and supporting groups should be

40 DeVaus, at 55, ('Overall the distribution of people according to country of birth was similar in the SCT sample and the 1981 census for Victoria. 69% of the SCT users were Australian born (cf. 69% in Victoria)).

41 See G. Bird, *The Process of Law in Australia: Intercultural Perspectives* (1988) (Sydney, Butterworths) 163-231.

sensitised to these differences and problems so that every care is taken to see that one is not denied access to the legal system because of multicultural barriers. These issues should also be part of Court staff and Referee training.⁴² Indeed, it has been argued that Small Claims Courts, by reducing worries about the cost of litigation and psychological trauma associated with the formal adversarial system, make the legal system as a whole more accessible to migrant groups.⁴³

Accessibility for the Poorly Educated

While migrants appear to find their way to the Small Claims Court, the same cannot be said of the less educated and consequently the poorer members of the community.⁴⁴ While this issue is analysed in more detail in sections ten and eleven, the disputants' survey revealed that the Court was more likely to be utilised by the educated and the middle to upper income earner. Moreover, these people were also more likely to be successful in their claim and thus more satisfied with the Court's performance.

42 G. Sheppard, *The Needs of the Ethnic Communities in the Courts Management Change Program* (1985) (Victoria, Attorney-General's Department) at 11-14.

There is a need to assist people to overcome . . . language difficulties by the use of multi-lingual signs or international symbols. The types of signs and symbols to be used can be discussed with the community and Courts administrators to ensure that this problem is overcome. . . .

In the construction or redevelopment of Court rooms, there are other matters also to be considered. Special interpreter booths should be built, special seating arrangements for interpreters in the Court should be considered, lighting is important for the deaf, the position of the interpreter has to be considered etc. etc.

43 See A. Crouch, 'Barriers to Understanding in the Legal Situation' (1979) 53 *Law Institute Journal* 505, 507.

44 See generally, B. A. Moulton, 'The Persecution and Intimidation of the Low Income Litigant as Performed by the Small Claims Court of California' (1969) 21 *Stanford Law Review* 21.

Table 5: Highest Level of Education

Response	CLAIMANTS		RESPONDENTS	
	Freq	%	Freq	%
Complete Uni/Tech	39	25.2%	34	33.3%
Some Uni/Tech	32	20.6%	17	16.7%
Trade Certificate	25	16.1%	12	11.8%
Completed Yr 12	24	15.5%	14	13.7%
Some Secondary	28	18.1%	21	20.6%
Completed Primary	6	3.9%	4	3.9%
Some Primary	1	0.6%		

- Notes
- 1.Base: individual claimants and respondents who attended hearing
 - 2.No response; corporate claimants: 67; No response and corporate respondents: 43

Consistent with the employment picture, the educational level of the disputants is higher one would find in the general population.⁴⁵ The Small Claims Court thus seems to be designed for and working better for the educated, the articulate and the comparatively more wealthy.

Among those interviewed, Registrar Mr Paul Huxtable⁴⁶ also noted that younger claimants and respondents were more likely to be aware of their rights. He felt this educational advantage was due in large part to the coverage of the Small Claims Court and its procedures in Legal Studies Courses in Tasmanian Secondary Schools. Consistent with their educational level, managers, administrators and professional people were over-represented amongst the disputants who utilised the Small Claims Court.

⁴⁵ This pattern is similar to that reported by deVaus, *op. cit.* at 52.

⁴⁶ Personal communication with Mr Huxtable, 10 July 1990 and on numerous other occasions. See Summary of Interviews, *op. cit.* s 4.

Table 6: Employment Status of Disputants

Response	CLAIMANTS		RESPONDENTS		Total	%
	Freq	%	Freq	%		
Managers & administrators	24	15.4%	8	8.0%	32	12/ 5%
Professionals	30	19.2%	17	17.0%	47	18.4%
Para-professionals	9	5.8%	8	8.0%	17	6.6%
Tradepersons	25	16.0%	10	10.0%	35	13.7%
Clerks	12	7.7%	8	8.0%	20	7.8%
Sales personal service	6	3.8%	4	4.0%	10	3.9%
Plant & machine operators	2	1.3%	7	7.0%	9	3.5%
Labourers	8	5.1%	8	8.0%	16	6.3%
Home Duties	14	9.0%	13	13.0%	27	10.5%
Student	9	5.8%	9	9.0%	18	7%
Pension/benefits	7	4.5%	5	5.0%	12	4.7%
Old age Pension	10	6.4%	1	1.0%	11	4.3%
Self Employed			2	2.0%	2	8%

Notes

1. Base: individual claimants attending hearing
2. No response; corporate litigants: 66; Respondents: 45

Note that if one compares the 1986 census figures, managers/administrators (8.9% Census), professional people (12.0% Census) are over represented, while labourers (13.9% Census), plant and machine operators (10.8% Census) are under represented.⁴⁷ Paul Huxtable⁴⁸ also contends that the number of self-employed is understated. The remainder were as expected.

6.3.5 Financial Barriers to Access/convenience

With only a \$20 filing fee,⁴⁹ there are likely to be few financial barriers to the utilisation of Small Claims Court. Most of those interviewed supported the maintenance of the existing \$20 fee.⁵⁰ One person⁵¹ suggested that pensioners and the unemployed should be able to have the fee waived upon the filing of a

⁴⁷ DeVaus, at 50, also found that there was an over-representation of those from upper occupational categories.

⁴⁸ Written comments on Preliminary Report made to the Justice Department, March, 1991.

⁴⁹ Note that during the period of this study, it has since increased to \$25.

⁵⁰ See Summary of Interviews, *op. cit.*

⁵¹ Personal conversation with Mr Reg Marron, Director of the Hobart Community Legal Service, 23 July 1990; See Summary of Interviews, *op. cit.* s 5..

poverty affidavit.⁵² Mr Huxtable pointed out that in a few cases, disputants who could not afford the filing fee were referred to Legal Aid with the result that the claimant's fees were paid for them. There was also some support for the view that the filing fee should be higher in order to discourage frivolous claims. Finally, a member of Consumer Affairs Officers⁵³ suggested a sliding scale where the fee was based upon the amount of the claim.

An examination of cost barriers to Small Claims Courts, however, must also consider the fact that over 50% of the disputants had to take time off paid employment in order to attend their Small Claims hearing.⁵⁴ Moreover, 25% of claimants and 36% of respondents stated that it was quite or very inconvenient to attend the hearing with the most frequently stated reason for inconvenience being difficulties with work.⁵⁵ Finally, witnesses, too, who are unpaid, will be reluctant to appear before the Small Claims Court if to do so would mean that they lose a day of pay or suffer some other significant inconvenience. When one factors in these additional costs, it can be concluded that there must be a 'chilling effect' which would deter some disputants, especially given the fact that the average amount of claim is only approximately \$800.

6.3.6 Physical Barriers to Access: the Location of the Court

A final aspect of access relates to the convenience of the physical location of the Court. In general terms, the Small Claims Courts in Tasmania are easy to

52 This is also a recommendation of the Model Statute for Small Claims Courts. See 'Judicial Reform at the Lowest Level: A Model Statute for Small Claims Courts' (1975) 28 *Vanderbilt Law Review* 28; A. Domanskis, 'Small Claims Courts: An Overview and Recommendation' (1976) 9 *University of Michigan Journal of Law Reform* 9.

53 Focus Group Interview with Officers from Consumer Affairs, 5 July 1990; See Summary of Interviews, *op. cit.* s 5.

54 See Table 67 below and discussion in section seven of this chapter. M. L. Bridenback, E. Purdum, and L. A. Brock, *Report on Small Claims in Florida* (1982) (Tallahassee, Office of the State Courts Administrator) (225 of those surveyed lost wages as a result of pursuing or defending against a small claim; and lost wages on average amount to nearly a third of the amount of the disputed claim). See generally, R. Braucher, 'Redress of Consumer Grievances, in Divita, S. and McLaughlin, F. (ed) *Consumer Complaints: Public Policy Alternatives* (1975) (Washington, D.C., Acropolis).

55 Issues of Small Claims Court Convenience are discussed in detail in section 8 of this Chapter.

locate because they have been integrated with the Court system as a whole. Thus, with the exception of Hobart, each major district (Launceston, Burnie and Devonport) houses a Small Claims in the same Court building as most or all other Courts. The Small Claims venue in Hobart has unfortunately led a gipsy existence and has alternated between the Executive Building on Murray Street and the Registry next to the State Library. However, both of these buildings would be reasonably well known to the public. Similarly, the Court buildings in Launceston, Burnie and Devonport are well known community fixtures. Nevertheless, the researcher's observations found the sign posting was generally inadequate. Signs relating to Small Claims were generally small, only in English, and often poorly placed. For example, a 'Small Claims' sign in the Launceston Court building was so high that the researcher failed to notice it at all, an incidence which a Court official acknowledged was a common occurrence amongst the public as well. In the case of Devonport, and much to the surprise of the Registrar, there was no sign inside or outside the building which referred to 'Small Claims'. Finally, a sign highlighting the availability of interpreters was posted in Hobart, but absent in the other Small Claims Courts when visited by the researcher.

More problematical is the convenience of Small Claims Court in areas, most notably rural areas, outside the regional centres. While Mr Hemming, the existing full-time Magistrate, has made an heroic effort to occasionally travel to King Island, Sorrel and elsewhere, it seems some other arrangement, for example the use of part-time Magistrates, and the holding of Small Claims sessions in areas like Bridgewater would greatly improve access to rural areas and those more likely to reach low-income disputants.⁵⁶

6.3.7 Suggestions to Improve Access

Those interviewed made a number of suggestions to improve access to Small Claims, including the following:

- improve the brochure and ensure that it meets the needs of respondents as well as claimants

⁵⁶ In the first part of 1992, the Government located a Community Legal Service Centre in the same area. In the researcher's view, a Small Claims Magistrate should also consider holding hearings there as part of a Small Claims out-reach project.

- more media coverage (radio, television, newspaper) of Small Claims, especially coverage targeted at specific groups such as low-income areas.
- better sign posting, both inside and outside Court buildings as well as at bus stops
- large posters located at post offices, local council buildings and other areas frequented by large groups of people.
- more 'verbal' signposting so that people who come to the Court know what to expect and what to do.
- more signs written in other languages and advertising the availability of interpreters.
- more Magistrates so that time could be spent by the Magistrate and Registrar to speak regularly to community groups.
- preparation of a video on Small Claims which could be either viewed at the Court or checked out by a disputant after paying a small security deposit;
- more training of Court staff so that they are sensitive to access issues.
- more frequent scheduling of Small Claims sessions in rural and lower-income areas.

6.3.8 Summary

After five years of operation, community awareness of the Small Claims Court has grown considerably, but greater awareness of both the Court and its procedures is necessary. Consequently, there is a need for the Small Claims Court to ensure that the different actors -- judges, disputants, Court personnel, community groups, businesses, etc -- 'converge' in their understanding of one another's roles and behaviour.

Because citizens utilising the Small Claims Court are expected to conduct their own cases, it is equally imperative that disputants, whether as claimants or respondents, feel empowered to use it. Given the fact that the average citizen is more likely to come into contact with a Small Claims Court than any other civil Court, and that their experience with that Court will shape their attitudes towards the legal system as a whole, it is critically important that the Small Claims Court function well that is accessible to all groups in society. While the needs of non-English speaking disputants appear to be adequately met, more must be done to improve the access of lower educated and lower income disputants. Indeed, it is disturbing to find that for the lower educated and lower income groups, the goal of 'equal access to justice' appears to be more illusion than reality.⁵⁷

Court administrators must be sensitive to the dissonance which certain disputants, especially the low-income and poorly educated, can experience in Small Claims Courts.⁵⁸ Because they involve the participation of ordinary citizens in the process of the law, Small Claims Courts have the unique potential to bridge the traditional gap which has historically existed between the legal system designed to serve as an 'agency of the politically and economically

⁵⁷ J. M Conley and W. M. O'Barr, *Rules Versus Relationships* (1990) (Chicago, Chicago University Press.

'Relational litigants are routinely frustrated by a rule-oriented legal system. They find their expectations confounded by the perspective behavior of judges and other legal officials. But many are able to maintain their idealized outlook on the law and their respect for the institution. Moreover, even though the frustrations of litigants have entered the public consciousness, there is no shortage of new customers, people bringing their problems to the courthouse and expecting to find justice. The key to managing the discourse appears to lie in the ability to distinguish the concrete from the abstract. Even after unsatisfactory personal experiences, many litigants continue to believe that "the law" shares their ideals, understands their concerns, and is interested in hearing their voices. they write off the frequent frustrations of dealing with the courts as the work of errant officials: ill-tempered clerks, lazy deputies, and inept judges. Rather than generalizing from their experience and concluding that the law is no better than the sum of its unsatisfactory parts, these litigants retain the belief in the abstraction of the law as distinct from its every day reality. Ironically, they join the discourse of traditional jurisprudence in accepting the proposition that the law speaks with a separate voice that is impartial and fair. By managing dissonance in this way litigants contribute to the stability of the legal system. The law can operate as an instrument of limitation without being perceived as such. At best, litigants learn to deal with the everyday reality of the legal system; at worst they go away dissatisfied. But rarely do they sense the need for fundamental change in its ideals and objectives. Instead, they accept the law's own view that modifying daily practice will constitute adequate reform.' (at 175).

⁵⁸ See Conley and O'Barr, *ibid*.

powerful'⁵⁹ and the average person. Thus, increased communication, letting litigants tell their own story, an increased awareness of the legal system -- all work to empower many who otherwise remain outside and removed from the law. By such processes, the Small Claims Court can play an important educational role because it is here that different classes are most likely to find themselves involved in the same lawsuit.⁶⁰

The information provided to disputants about Small Claims Court tends to be weighted more in favour of the claimant than the respondent. Indeed, many respondents do not find out anything about the Small Claims Court until they show up for their hearing, assuming they do show up. The significance of this issue was also borne out by Weller and Ruhnka who similarly found that the 'difficulties faced by the unrepresented defendant constitute perhaps the major failing of our present Small Claims systems.'⁶¹ Unfortunately, respondents in the Tasmanian Small Claims Court face many of the same problems.

As to financial barriers, the consensus amongst those interviewed is that the existing filing fee of \$20 should be maintained, adjusted only for inflation. However, some consideration should be given to fee waivers for those in genuine need. More serious are the less obvious costs of attending a Small Claims hearing (missed work, lost wages, absence of child care, etc) which must be borne both by disputants and witnesses. The Small Claims Court must give much more attention to these 'inconvenience' issues which can deter a party from seeking redress through the system, especially having regard to the fact that the majority of claims are indeed 'small', averaging just over \$800.

Finally, both verbal and physical sign-posting in relation to Small Claims could be improved and Small Claims sessions should be more readily available in rural and lower-income areas.

59 *Ibid.* 177.

60 T. G. Ison, 'Small claims' (January 1972) 35 *Modern Law Review* 23.

61 S. Weller and J. Ruhnka, 'Small Claims Courts: Operations and Prospects, (Winter 1978) *State Court Journal* 5, Research Essay Series Number E006 (Williamsburg, Va, National Center For State Courts) (Their findings from their survey of 15 Small Claims Courts in 14 different states in the USA revealed that much was being done to assist the pro se claimant, including instruction booklets⁶¹ and clerk assistance, or even paralegal advisers in some states. In contrast, the respondent often received none of this assistance as many disputants had no contact with the Small Claims Court until trial day, while others defaulted.)

By all of these means, access to the Small Claims Court might be further improved.

6.4 Filing of the Claim, Transfers from Court of Requests, Joinder

6.4.1 Length of the Dispute

Claimants were requested to state the length of time they had been aware of the dispute before they filed a claim with the Small Claims Court.⁶² Respondents were asked how long they had been aware of the dispute before receiving notice of the claimant's action.

Table 7: Length of time Claimants were Aware of Dispute
Before Filing the Claim with Small Claims

Response	Freq	%
1month or less	47	23%
1-3 months	58	28%
3-6 months	42	20%
6-12 months	39	19%
12-18 months	9	4%
over 18 months	12	6%

- Notes
- 1. Base = Total claimants
 - 2. No response=19

Just over half (51%) of the claimants were aware of the dispute three months or less prior to filing the claim. A total of 71% were aware of the dispute six months or less before filing. Only 9% of claimants were aware of the dispute for more than one year.

⁶² For a discussion of the evolution of disputes see W. F. Felstiner, R. L. Abel and A. Sarat, 'The Emergence and Transformation of Disputes: Naming, Blaming, Claiming (1980-81) 15 *Law and Society Review* 631-654; R. E. Miller and A. Sarat, 'Grievances, Claims, and Disputes: Assessing the Adversary Culture' (198081) 15 *Law and Society Review* 525-566.

**Table 8: Length of Time Respondents Were Aware of Dispute
Before Learning Claimant had Filed the Claim**

Response	Freq	%
1 month or less	23	17%
1-3 months	48	36%
3-6 months	34	26%
6-12 months	19	14%
12-18 months	7	5%
over 18 months	2	2%

Notes

- 1. Base = Total respondents
- 2. No response/information: 13

For the respondents, 53% were aware of the dispute three months or less prior to receiving notice of the claim being filed and 79% were aware of the dispute for six months or less. Only 9% were aware of the dispute for more than a year. Therefore, the disputes which came before the Small Claims Court were reasonably recent and there were few long term disputes.⁶³

6.4.2 Help Obtained for Settling the Dispute

Both claimants and respondents were questioned whether they had asked for help or advice in settling the dispute before the claim went to the Small Claims Court.⁶⁴

⁶³ NZ Study, at 4 (69% were aware of the dispute three months or less prior to being filed; 69% six months or less and 11% for more than a year); deVaus at 118 found that the longer the duration of the dispute the less likely it was to be withdrawn or settled.

⁶⁴ NZ Study at 5 (the figures were slightly lower for claimants: 66 % and significantly lower for respondents, 39%).

Table 9: Whether Disputants Asked
for Help or Advice Beforehand

	CLAIMANTS		RESPONDENTS	
Response	Freq	%	Freq	%
Yes	149	72.9%	75	5.2%
No	55	27.1%	604	4.8%

Notes: 1. Base= total claimants and respondents who have had hearing; 2. Claimant No response : 18; respondent: 11

These disputants were then asked to whom they went for help or advice.⁶⁵ The fact that lawyers are so frequently consulted and so often recommend Small Claims Court to their clients suggests that the legal profession is generally supportive of the Small Claims system.⁶⁶ Indeed, informal interviews with numerous Tasmanian lawyers revealed that the low fee structure established for lawyers in the Court of Requests (the alternative of going to Small Claims) and the cost of appearing in the Court of Requests are such that lawyers, often cannot financially justify such an action on behalf of clients. Thus, the best advice, in most instances, is to recommend that their clients seek redress in Small Claims. The other major alternative is for the client to waive the recommended fee structure amounts in which case lawyers' fees may well exceed the amount recovered.

The survey data revealed that the majority of disputants learned about Small Claims through personal or business contacts rather than through established social agencies such as Consumer Affairs and Legal Aid. However, the qualitative data from the interviews suggests that the survey data should be

⁶⁵ NZ Study (at 6) also found lawyers (43% of claimants and 51% of respondents) were by far the most commonly asked person for help or advice followed by friend/business acquaintance (16%/17%); deVaus, at 89 ('Of those who sought legal help before going to the SCT about 60% said it was the solicitor who suggested they use the Small Claims Tribunal').

⁶⁶ Previous studies have also emphasised the importance of the receptivity of the legal profession in the success of court initiatives such as Small Claims procedures and other forms of alternative dispute resolution. See J. A. Wall and D. E. Rude, 'Judges' Mediation of Settlement Negotiations' (1987) 72 *Journal of Applied Psychology* 234-39.

interpreted with caution. For example, Registrar Paul Huxtable⁶⁷ and others⁶⁸ suggest that the survey percentages for the Tenants Union and Community Legal Service are too low and therefore not representative of the population as a whole.⁶⁹

Table 10: To Whom Did Claimants Go for Advice?

Response	Freq	%
Lawyer/solicitor	71	48.0%
Insurance Co/Claims assessor	30	20.3%
Friend/family	24	16.2%
Consumer Affairs	15	10.1%
Legal Aid	11	7.4%
Collection Agency	11	7.4%
Accountant	3	2.0%
Court Staff	3	2.0%
Other disputant	3	2.0%
Police	2	1.4%
Tenants Union	1	0.7%
Comm. Legal Service	1	0.7%
Real estate agent	1	0.7%
Other	1	0.7%
Ombudsman	1	0.7%

Notes

1. Base = 149 claimants who asked for help or advice

⁶⁷ Written Comments received from Paul Huxtable regarding the 1991 Interim Report on Small Claims.

⁶⁸ For example, Magistrate Hemming in his comments on the 1991 Interim Report, *op. cit.*

⁶⁹ Note that this is a good example of the use of qualitative data to help validate and test the significance of survey data. Indeed, in the author's view the use of triangulation in such a way is often much more reliable than the often unstated assumptions found in 't' scores and other statistical inferences.

Table 11: To Whom Did Respondents Go for Advice?

Response	Freq	%
Lawyer/ Solicitor	44	48.9%
Ins Co	17	18.9%
Friends	8	8.9%
Legal Aid	5	5.6%
Consumer Affairs	4	4.4%
Other disputant	4	4.4%
Collection agency	3	3.3%
Community Legal Serv.	2	2.2%
Other	2	2.2%
Court staff	1	1.1%

Notes

- 1. Base: Respondents who asked for help or advice
- 2. Some disputants answered this question who did not respond to previous question 2(a)

6.4.3 Suggestion to Go to Small Claims Court

While the previous question wanted to know to whom the disputants went for help, in this question the claimants were asked who suggested that they go to Small Claims.⁷⁰

⁷⁰ Compare NZ Study at 7 (Claimant's own knowledge, 33%; lawyer, 24%; insurance company, 14%); deVaus, at 48, (most sought help or advice from family/friends (54%) and/or consumer affairs (54%); while solicitors were consulted by 23% of claimants).

**Table 12: Person/Organisation who Suggested Claimant
go to Small Claims Court**

Response	Freq	%
Lawyer	60	28.2%
Insurance Co	41	19.2%
Self	22	10.3%
Consumer Affairs	16	7.5%
Friend	13	6.1%
No one	12	5.6%
Family members	10	4.7%
Comm Legal Service	7	3.3%
Legal aid	6	2.8%
Friend/Ins Co	4	1.9%
Opponent	4	1.9%
Respond lawyer	3	1.4%
Family/Self	2	0.9%
Friend/lawyer	2	0.9%
Lawyer/ins co	2	0.9%
Lawyer/legal aid	2	0.9%
Cons Affairs/Ins/Lawyer	1	0.5%
Cons Affairs/opponent	1	0.5%
Family/Cons A/Lawyer	1	0.5%
Family/Friend	1	0.5%
Lawyer/opponent	1	0.5%
Own lawyer/resp lawyer	1	0.5%
Resp lawyer/ins	1	0.5%

Notes

1. Base= total number of claimants
2. No response/information: 9

Comparing this question with the previous question reveals that a significant number of lawyers who were consulted about the disputant's claim failed to recommend the Small Claims Court. In contrast, for insurance companies the percentage of disputants who stated they had consulted their insurance company was about the same as those who stated that their insurance company suggested they go to Small Claims. These statistics suggest that insurance companies are more supportive of Small Claims than the legal profession.

However, taken on their own, these statistics are misleading. This is because almost all of the cases involving an insurance company arose out of a motor vehicle accident. In the vast majority of these cases, it is the insurance company which insisted that the claimant help recover part of the amount paid out by the company by initiating a Small Claims action against the other driver. Consequently, the percentage of cases in which the disputant learned about Small Claims from the insurance company and the company recommended Small Claims should correspond. In contrast to the motor vehicle insurance cases, the resolution of general legal problems involving varied and diverse circumstances might be achieved by a variety of methods some more formal (Court of Requests) and others less formal (e.g. sending a demand letter) than Small Claims Court. Accordingly, one would not expect lawyers always to recommend Small Claims, nor should they do so. Also, in a motor vehicle accident case, a disputant would almost always contact their insurance company immediately. Thus, the disputant would both hear about and be encouraged to use Small Claims by the same party. In contrast, lawyers are often one of the last parties consulted in a dispute and one would expect that many disputants would have heard of Small Claims from another source and then gone to a lawyer who will confirm whether going to Small Claims is the appropriate course of action.

6.4.4 Whether Dispute Would Have Been Taken to Court of Requests

Claimants were asked whether or not they would have taken the dispute to the Court of Requests had there been no Small Claims Court?⁷¹ Over a third of claimants and almost half of respondents stated they would definitely have gone to the Court of Requests had there been no Small Claims Court. From the stand point of efficient use of resources, the fact that litigants utilise the Small Claims Court as opposed to the Court of Requests represents a cost savings in that the cost per case of the Small Claims Court is considerably lower than the cost associated with trying the same case in the Court of Requests. However, the number of disputants who indicated they would have gone to the Court of Requests is likely to be overstated and some would have likely changed their

⁷¹ In the NZ Study (at 8), there was more of an even split between those who stated they would and those who said they would not have gone to the formal Court (29% definitely yes; 19% probably; 30% probably no; 21% definitely no); In Victoria, deVaus, at 94 found 52% of those who went to a hearing stated they would have gone to Court had there been no Small Claims Tribunal; a number which he argued was exaggerated given the eventual costs of going to Court and the small size of most claims.

mind once solicitors' fees, Court costs, delays, etc were made known to the disputant and taken into account. Also, given the average value of a claim (mean) was only \$808, it is unlikely that the bottom half of these cases would end up in the Court of Requests. I would conclude, therefore, as did deVaus⁷² in Victoria, that, while the Small Claims Court to some extent relieves the work load of the Court of Requests, a significant number of the small claims are additional to those which would have gone to the Court of Requests.

Table 13: Whether Claimant would have Taken Dispute to
the Court of Requests

Response	Freq	%
Definitely yes	72	35.6%
Probably yes	64	31.7%
Probably no	47	23.0%
Definitely no	20	9.7%

Notes:

1. Base = total claimants

2. No response=18; don't know=1

Further evidence that the disputes heard in Small Claims often represent 'new' cases, rather than cases which would have previously been heard by the Court of Requests was given by Chief Court Administrator, Mr England,⁷³ who noted that since the Small Claims Court has been in existence the number of cases being heard in the Court of Requests has fallen, but not by the large amount one would have expected. This observation was also confirmed by Chief Magistrate, Mr Morris⁷⁴ and the Registrars⁷⁵ in each region of the State.

72 DeVaus, at 95. Similarly, studies of neighborhood justice centers in the US have found that such centers resulted little change in the local Court case loads. See e.g., S. Merry, 'Defining "Success" in the Neighborhood Justice Movement' in R. Tomasic and M. Feeley (ed) *Neighborhood Justice: Assessment of an Emerging Idea* (1982) (New York, Longman) 193.

73 Personal communication with Mr David England, 6 February 1990; see Summary of Interviews, *op. cit.* s 4.

74 *Ibid.*

75 *Ibid.*

Those claimants who responded that they would not have taken the dispute to the Court of Requests were further asked why they would not utilise the Court of Requests for their small claim.

Table 13a: Why Claimants Would Not Have Gone to the Court of Requests Had There been No Small Claims Court

Response	Freq	%
Cost too much	34	45.3%
Amount Not worth it	20	26.7%
No knowledge of Crt Req	7	9.3%
Insurance matter (their decision)	5	6.7%
Delay	5	6.7%
Lawyer advise against it	2	2.7%
Too complicated	1	1.3%
Not enough evidence	1	1.3%

Notes:
1. Base: Claimants who would not have gone to the Court of Requests had there been no Small Claims Court

These responses suggest that the Small Claims system is working to provide justice to disputants who otherwise are precluded from using a Court system which is too expensive considering the amount of the claim, too intimidating to use without legal representation and too slow to be effective for these types of claims.

6.4.5 Method of Filing Claim

Claimants were questioned as to how they filed their claim. Most (56.9 %) filed the claim in person (see Table 14 below).⁷⁶ The researcher was surprised to find that almost 15%⁷⁷ of the claimants reported that their insurance company filed their claim. The potential abuse of such a practice was discovered when nine phone calls were received from disputants (whose case had settled without

⁷⁶ NZ Study (57% in person; and 37% by mail, 2% by Insurance Company). In contrast to Tasmania, NZ only reported approximately 10% of cases were ones transferred from the higher Court. NZ Study at 10.

⁷⁷ Compare 2% filed by Insurance companies in NZ.

a hearing and who had been mailed a survey questionnaire) who all claimed that they never were involved with the Small Claims Court. Further investigation revealed that in each case the insurance company had completed a claim form and filed it with the Court without informing the insured that they had done so. This problem has to some extent been alleviated by a ruling that insurance agents are no longer permitted to sign a claim form on behalf of their insured. Nevertheless, the interview data suggests that many insurance agents simply keep a supply of forms ready at hand and ask the insured to blindly sign them while the agent attends to all the 'details'.

Table 14: Method of Filing the Claim

Response	Freq	%
In person	111	56.9%
By mail	38	19.5%
Insurance Co (most by mail)	29	14.9%
Collection agency	6	3.1%
Solicitor	5	2.6%
Consumer Affairs	2	1.0%
Other	5	2.6%

Notes:

- 1. No response: 26
- 2. Percentages do not add to 100 because of rounding off

It is also significant that the interview data supported the view that most litigants have little difficulty with the claim form. For example, interviews⁷⁸ with Court staff and Registrars indicated that most disputants completed the claim form without difficulty, taking approximately 15 minutes to do so.⁷⁹

⁷⁸ Numerous informal discussions were held with Court staff while the researcher worked on a part-time basis computerising the Small Claims Court files.

⁷⁹ Iowa Study, 469-470 (Of those who could recall, 42% said they filled out form in 15 minutes; as expected first time users took a little longer; however a third of the clerks stated completion of forms was difficult, especially for first time users) Ruhnka and Weller, National Study' at 179 (found 10% of plaintiffs had problems with forms); MASSPRIG at 38 ("plaintiffs questioned overwhelming found forms and instructions simple and understandable")

6.4.6 Assistance Provided by Court Staff

'The Small Claims Court is often a person's first and only contact with the Court system.'⁸⁰ In recognition of this fact, s 12 (2) of the Tasmanian legislation⁸¹ provides:

A registrar shall give his assistance, or cause assistance to be given, to a person who seeks it in completing the prescribed claim form before filing it in a registry.

As shown by Table 15 below, over 80% of both claimants and respondents viewed the Court staff as helpful.

Table 15: How Helpful the Claimants thought the Court Staff Were⁸²

Response	CLAIMANTS		RESPONDENTS	
	Freq	%	Freq	%
Very helpful	55	38.2%	14	25.5%
Quite helpful	65	45.1%	31	56.4%
Not very helpful	14	9.7%	6	10.9%
Not at all helpful	9	6.3%	4	7.2%

Notes

1. Not applicable 54
2. No response: 25
3. Percentages do not add to 100 due to rounding off

The degree of 'helpfulness' may be overstated in the case of respondents. This is because many respondents have little contact with the Court with over 25% not showing up for their cases at all (Table 16 below). However, as shown in

⁸⁰ W. DeJong, *Small Claims Court Reform* (1983) (Washington D. C., National Institute of Justice) 3.

⁸¹ *Magistrates Court (Small Claims Division) Act 1989* (Tas).

⁸² Compared to NZ, A higher percentage of respondents in Tasmania approved of the helpfulness of Court staff (81% vs 68%); 84% of claimants in both studies rated the Court staff as 'helpful'. NZ Study at 12. See also, deVaus, at 70 (89% of claimants said 'the SCT staff with whom they had initial contact at the Tribunal were helpful'; those who lost their case were less likely to perceive the staff as helpful-76% vs 95% of those who won; the feelings were the same regardless of age, gender, occupation level, education, marital status, place of birth, years in Australia or main language).

Table 15, 80% of those respondents who did ask for Court assistance found the Court staff to be 'helpful' or 'very helpful'.

Table 16: Did the Respondents Ask for Information or Assistance?

Response	Freq	%
Yes	39	29.8%
No	92	70.2%

Notes

- 1. Respondents whose case was set for hearing
- 2. No response/information: 14

Disputants who rated the Court staff as 'not helpful' were asked to state the ways in which the Court staff were not helpful. (31 claimants made comments). The reasons given were:

- Not enough information/help (eg filling out form, directions to Court room, etc (over a fourth of the comments) (12)
- Staff disinterested; litigant seem as a nuisance (over a third of the comments) (7)
- Staff incompetent
- Assumed too much knowledge on the part of the litigant
- Derogatory comments made about the merits of the claim
- Grumpy
- Didn't adequately check over form, leading to problems later on
- Poor communication
- Inefficient advice regarding enforcement
- Litigant disagreed with advice given by staff

Seven respondents gave reasons why the Court staff were not helpful. Four stated there was not enough information; one that the staff were not interested; and one that the staff were incompetent. One of the lawyers interviewed⁸³ also felt that Court staff were not always as helpful and knowledgeable about the nature of Small Claims procedures as they should be.

Disputant comments about the Court personnel giving the wrong advice raises the problem of rejection of claims which appear to be outside the Court's jurisdiction. The Registrar, Paul Huxtable,⁸⁴ indicated that Court staff, in consultation with the Magistrate make that determination. However, if parties say they have seen their lawyer and the lawyer insists that the matter is one properly within the Court's jurisdiction, then the claim is lodged and the Magistrate is left to decide the issue. No log of rejected claims and reasons for rejection is maintained. Another issue concerns the problem of giving legal advice. While Court staff have a duty to assist the disputants, as non lawyers, they must also be careful not to give 'legal advice'. In reality, there is often a very fine distinction between giving information and giving legal advice.⁸⁵ Several⁸⁶ of those interviewed suggested the need for more specialised training in this area. Some of those interviewed suggested the need for a community

83 Interview with Reg Marron, private practitioner and Board Member, Hobart Community Legal Service, *op. cit.*; see Summary of Interviews, *op. cit.* s 5.

84 Formal and informal communication with the Registrar, Mr Huxtable, see Summary of Interviews, *op. cit.* s 4.

85 Weller and Ruhnka conclude this is no problem and that clerks help screen cases in which their clearly is no cause of action. See Weller and Ruhnka, (1978) *op. cit.* 192 -93. They found some Courts refused to permit their clerks to give legal advice on the grounds this constituted 'unauthorized practice of law' and some were concerned about the possibility liability of the Court should a clerk give the wrong advice. However, the experience of the Harlem Court was that 'paralegals and intake clerks can be trained to give useful advice and to know the limits of their own knowledge. The unauthorized practice of law issue is, we believe, of little merit.' (p. 7). See also 'Iowa Study, at 468 where the authors recommend that 'adequate booklets or lay advocates able to assist parties with filing and preparation for trial could alleviate many of these problems'. While many commentators make this suggestion, The Iowa study found that the judges were generally against it, though it was unclear whether the reason was financial constraints or reluctance to have lay personnel assisting litigants.

86 See e.g, interview with Registrar Paul Huxtable, Summary of Interviews, *op. cit.* s 4.

advocate system by which disputants--claimants and respondents--could receive assistance and advice in regard to their Small Claim matters.

6.4.7 Whether More Assistance Required

Given the under-representation before the Small Claims Court of people in the lower socio-economic groups, it is possible that more assistance is needed to overcome the psychological and knowledge constraints which may keep such groups away. Although the survey questionnaire did not specifically ask about the claim form, the comments regarding the need for additional assistance in completing the form suggest there is little problem in this area.⁸⁷ Rather, as indicated above in the discussion of access, the problem appears to be inadequate information regarding Small Claims Court procedures, and especially the fact that the information given does not adequately consider the needs of the respondent.

To partly redress the imbalance between assistance given to claimants and respondents, the Registrar now sends the booklet to the respondent at the same time the notice of claim is posted. Previously, the respondents received such information only if and when they showed up for the hearing.

Another problem in connection with advice to disputants is the problem of enforcement. A common complaint about Small Claims Courts in many jurisdictions is the inability of winning parties to collect on their judgment. Accordingly, Tasmania's booklet, like that of many other jurisdictions, now advises litigants that getting a judgment is only half the battle and that the judgment may be uncollectable because of the inability of the losing party to pay.

Disputants were also asked whether they would have liked more help when filling out their claim form (claimants) or responding to the claim (respondents). The figures in Table 15 indicate that 80% of claimants and respondents considered that the Court staff were helpful, though this is not to say that more help is not needed.

⁸⁷ DeVaus, at 68-69 (91% of those who went to the hearing had no difficulties with the claim form; and the 9% who had difficulty tended to be those for whom English was a second language or those with little education. DeVaus suggests this is in part why these groups are underrepresented before the Tribunal. However, those who had difficulty with the form had no lower success rate in the outcome of their case.).

Table 17: Whether Disputants Needed More Information/assistance

CLAIMANTS			RESPONDENTS	
Response	Freq	%	Freq	%
Yes	32	21.5%	53	43.4%
No	117	78.5%	69	56.6%

Notes
1. Base: Claimants & Respondents whose case did not settle before hearing
2. No response/information: 72(claim); 23 (resp)

Some of the areas in which disputants would like more help have been referred to above. Other areas were suggested by those interviewed, especially Mr Reg Marron,⁸⁸ lawyer and Board Member of the Hobart Community Legal Service.

The whole process needs to be broken down into its various steps so people understand the situation and how to go about resolving it. For example, before a hearing people should realise that they must have exchanged proofs, exchanged aspects of quantum. Can they agree on quantum? In other words, the sort of things you normally consider on pre-trial? When people file their claim they should be able to make their own statement or simply be directed to answer a number of questions which would relate to important items. For example, what is the quantum? Is it supported by evidence? If not where is the evidence? If so, is it attached? When the reply comes in from the respondent, the claimant should have to answer, do you agree with the quantum? etc. This would simplify things by making the parties participate more. The form itself could say that if you have any trouble with these matters you can call the Court. In fact I understand that under the Act registry staff are

88 Personal communication with Mr Reg Marron, *op. cit.* See Summary of Interviews, *op. cit.* s 5.

charged with assisting the litigants in preparing their claims.

Amendments to the *Small Claims Act* in 1989⁸⁹ authorised Registrars to conduct conferences with disputants to help them prepare for their hearing and to investigate the possibility of settlement. Unfortunately, few of these conferences had been conducted during the period under study and it is too early yet to ascertain how effective they have been in assisting parties.

6.4.8 Transfers from the Court of Requests

Disputants were questioned as to whether or not their claim was transferred from the Court of Requests, a procedure which is provided for in s 14 the Tasmanian legislation.⁹⁰ Either party has a right to have a case transferred to Small Claims, which case was, originally filed in the Court of Requests, but was within the Small Claims jurisdiction.

Table 18: Transfers from the Court of Requests

Number transferred	% of total cases
181	19.1%

Notes: 947 cases; 55 missing. Total N: 1002
This is a decrease from 1985-86 when Hamilton found 30% of all claims transferred from Court of Requests.

Originally filed cases are assuming a larger share of total number of cases. Note also that the figure continues to decline.⁹¹ This suggests that increasingly people are becoming aware of, and attracted to, the Small Claims Court and filing their minor civil dispute actions there as opposed to the Court of Requests. The evidence above also suggests that the Small Claims Court increasingly hears many cases which would not otherwise have made their way to the Court of Requests. The Small Claims Court appears to attract both cases which previously would have been filed in the Court of Requests as well as a

89 See Small Claims Regulations, Rule 14.

90 *Magistrates Court (Small Claims Division) Act 1989* (Tas).

91 Comments in response to the Preliminary Report (1991) from Small Claims Registrar Paul Huxtable, from Jan-March 1991 33 cases were transferred from the Court of Requests. This represented only 16% of the cases filed.

'new' group of cases which are brought to the Small Claims Court only because of the existence of such a forum. To that extent, the Small Claims Court appears to have increased access to justice for the resolution of minor civil disputes.

Interestingly, while there is a statutory procedure which permits a case to be transferred from the Court of Requests to Small Claims Court; no provision is made for a transfer in the other direction. Former Registrar, Barry Hamilton⁹² was one who stated that he had received letters from approximately five parties or their solicitors that a procedure should exist to transfer a case back to the Court of Requests if deemed fair and necessary by the Magistrate.

6.4.9 Party Joined

The Tasmanian Small Claims legislation⁹³ provides that a Magistrate on his own motion or on the application of one of the parties 'may join a person as a party to the proceedings if the Referee is satisfied that that person has a sufficient interest in the settlement of the dispute to which the small claim in question relates.'⁹⁴ The file survey indicates that parties (usually insurance companies) were joined in almost one third of all cases. This is as expected given the proportion of motor vehicle accident cases (see Table 19 below).

Table 19: Cases in which a Party was Joined

Number of cases	% of total cases
<u>264</u>	<u>28.1%</u>

Note:
Total N: 1002; 55 missing; 8 no service of process
Includes cases which were subsequently dismissed or settled as well as those heard

If essential third parties are not joined, this can lead to the necessity of the hearing to be adjourned or dismissed.⁹⁵ Also, given the informal nature of

92 Personal communication with Mr Hamilton. See Summary of Interviews, *op. cit.* s 4.

93 Section 17(2).

94 *Ibid.*

95 Ingleby (1991), *op. cit.* 21.

Small Claims proceedings and the fact that parties, who are not represented by lawyers, may not realise that a third party's participation is essential or relevant, the Court should be liberal in its application of joinder rules. This does not, however, appear to be a problem with Small Claims in Tasmania, in large part, because the Registrar, Magistrate and Court staff are generally alert to join any party who appears essential to the determination of a claim. However, the potential problems inherent in the joinder of parties do illustrate why Small Claims Court staff must have training which is specific to the needs of a Small Claims Court vis-a-vis a more formalistic higher Court in which lawyers are involved.

One legal issue which is unresolved in Tasmania is whether an insurance company is technically a 'party' in a case in which its insured is involved in a motor vehicle case. Arguably, the insurance company does not have an interest until the insured receives a judgment; prior to that time the only real party in interest is the insured. This issue is discussed in detail in section 7 of this chapter.

6.4.10 Service of Process

The disputant survey questionnaire did not address the issue of service of process. However, the file survey showed that less than 1% of cases filed in Small Claims were dismissed because of the failure to obtain service of process on the respondent. Interviews with Court staff⁹⁶ similarly indicated few if any problems exist in this area. The reason for this, I would speculate, is related to Tasmania's comparatively stable population and the fact that most small claims are fairly recent disputes as seen in 6.4.1 above.

6.4.11 Summary

Disputes filed in Small Claims Court were reasonably recent and there were few long term disputes.⁹⁷

⁹⁶ Personal communication in the form of informal interviews with the Registrar and other Court staff during 1989-1992; See Summary of Interviews, *op. cit.* s 4..

⁹⁷ NZ Study, at 4 (69% were aware of the dispute three months or less prior to being filed; 69% six months or less and 11% for more than a year); deVaus at 118 found that the longer the duration of the dispute the less likely it was to be withdrawn or settled.

A lawyer is the person most often asked for help about a small claim and the person or entity most likely to recommend that a disputant avail themselves of the Small Claims Court procedure. The survey statistics and interview evidence suggest that the legal profession in Tasmania is generally supportive of the role and purpose of the Small Claims Court.

The Small Claims Court has reduced the workload of the Court of Requests and thereby saved money by handling cases at less cost and saved time by handling cases more expeditiously. Importantly, the Tasmanian Small Claims Court is increasingly dealing with disputes which otherwise may have been left unresolved. In this sense, access to justice for small civil disputes has been increased.

Most claims were filed in person, though a significant percentage are mailed to the Court.

Over 80% of both claimants and respondents viewed the Court staff as helpful. Nevertheless almost half of the disputants stated they would like more help, especially in how to prepare their cases, knowledge of Small Claims Court procedures, and enforcement problems and remedies. The fact that almost half of the disputants would have liked more help requires prompt attention because the Small Claims literature,⁹⁸ as well as common sense, indicates that the helpfulness of Court staff is one of the key determinants of disputant satisfaction.⁹⁹ Administrative factors¹⁰⁰ such as the ready availability and ease

98 See S. Weller, J. Martin, and J. C. Ruhnka, 'Litigant Satisfaction with Small Claims: Does Familiarity Breed Contempt?' (Spring 1979) *State Court Journal* 3 (helpfulness of Court staff was a key determinant of litigation satisfaction with Small Claims. Focusing on the reception accorded to potential plaintiffs in the clerk's office, they stated:

'In New York, the staff whom we saw behind the counter seemed to think little of the people they were supposed to be helping and tended to shout and bully so that thin-skinned plaintiffs could have been put off. In Philadelphia, the equivalent officers sat behind tables, rather than a counter, and were courteous and helpful.'

See also, Consumer Council, *Justice Out of Reach: A Case for Small Claims Courts* (1970) (London, Her Majesty's Stationery Office) 24. The Consumer Council Study indicated that a disputant's decision to litigate was influenced by the ease with which filing forms could be obtained.

99 Factors influencing disputant satisfaction are discussed fully in section 12 of this chapter.

of completion of Court forms are also factors in the degree of perceived helpfulness.¹⁰¹ One possible reform is to investigate the possibility of obtaining a special 'Small Claims adviser' to help with such matters as forms, Court procedures and general advice.¹⁰² Just as Small Claims procedure demands the judge to be more inquisitorial, perhaps the Small Claims system, in contrast to more formal Courts, must be more pro-active, involved, rather than passively waiting for the claimant to 'make things happen.'¹⁰³

Approximately one case in five is transferred to the Small Claims Court from the Court of Requests. However, this percentage continues to decline as disputants become more knowledgeable of the Small Claims system.

Parties are joined in almost a third of Small Claims cases. The vast majority of these involve the joinder of insurance companies in motor vehicle accident cases.

There appears to be little difficulty regarding service of process in Small Claims cases.

100 Such topics as readability of Court forms are discussed in full in section 13 of this chapter.

101 The Consumer Council Study indicated that a disputant's decision to litigate was influenced by the ease with which filing forms could be obtained. See Consumer Council, *Justice Out of Reach: A Case for Small Claims Courts* (1970) (London, Her Majesty's Stationery Office) 24.

102 Similarly, the Small Claims Study Group found that the need for private citizens for help was sufficiently pressing to require such an adviser at both the filing and hearing stages. Small Claims Study Group, *op. cit.* 63-68

103 See M. Galanter, 'Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change' (Fall 1974) 9 *Law and Society Review* 119.

6.5 Nature of Claims filed in Small Claims Court

6.5.1 Introduction

As part of the present study, the researcher conducted a survey of Court files which included cases occurring during the second half of 1988 and the first half of 1989. The purpose of the file survey was to obtain a state-wide view of the nature of small claims filed in Tasmania. Also, the trends evident in the file data, which involved the total population of Small Claims cases filed in Hobart, helped to check the representativeness of the survey sample.

6.5.2 Number of Claims Filed

The Small Claims division of the Court of Requests began hearing cases on September 15, 1985. Since that time, though the number of staff has remained the same, the number of cases handled has grown each year. The rate of this growth is shown in Tables 20 and 21 below.

Table 20: Growth in Number of Cases Heard

Region	85-86	88-89	%growth
Hobart	573	842	47%
Launceston	194	330	70%
Burnie	73	140	92%
Devonport	116	150	29%

Table 21: Small Claims Cases filed per calendar year

Where filed	85	86	87	88	89
Hobart	132	670	634	739	883
Launceston	44	200	129	261	400
Burnie	26	85	120	138	141
Devonport		26	118	120	138

Note: 1985 figures for Devonport were unavailable

Interestingly, the rate of growth is greater in the Northern part of the State. I suspect that is related to four factors: 1) the smaller community in which the Small Claims Court is situated makes it easier for people to learn about the existence of Small Claims; 2) there is a larger percentage of insurance/motor vehicle accident cases suggesting that insurance companies in the North have made greater use of the Court than their southern counterparts; 3) being smaller communities, there are fewer 'alternative' dispute resolution choices available in the North, thus people are more likely to go to Small Claims Court; and 4) the

fact that the first Special Commissioner, Michael Hill, was a well known and respected identity in the North would also endear the Court to the population.

6.5.3 Types of Claim Filed

Unfortunately no official records are kept regarding the types of claims filed in the Small Claims Court. Accordingly, the researcher 'roughly' categorised the types of dispute into four categories: landlord/tenant claims, contract claims, motor vehicle claims and others as shown in Table 22 below.

**Table 22: Types of Claims filed In the Tasmanian Small Claims Court
Fiscal Year 1989**

Type of Claim	Freq	%
Landlord/tenant	50	5%
Contract	342	34%
Motor vehicle	474	48%
Other	73	7%
Unavailable	62	6%

Note

1. Total N: 1002

Not only has the number of cases handled each year grown significantly, but motor vehicle claims are assuming an increasingly greater share of the total number of cases filed. The exact figures are not available, but the percentage of motor vehicle cases has increased from just over one third of all cases in 1985-86 to almost half of all cases filed in 1988-89.¹⁰⁴

Another aspect of the types of claim concerns their complexity. The researcher's observations and discussion with Magistrates¹⁰⁵ suggests that the small amount of money involved in a Small Claims dispute does not mean that the claim is necessarily legally or factually simple. For example, one of the cases observed in the present study involved an extremely complicated building dispute involving an architect, contractor and sub-contractors in which both the facts and the law were quite complex. Similarly, Magistrate Michael Hill¹⁰⁶ reported another Small Claims case involving quite complicated antitrust issues in

¹⁰⁴ See NZ Study, Report 2, at 1-2 (damage by motor vehicles was the largest category of claims followed by claims related to work done or services provided).

¹⁰⁵ See Summary of Interviews, *op. cit.* s 3.

¹⁰⁶ Personal Communication with Magistrate Hill, 7 February 1990. Summary of Interviews, *op. cit.* s 3.

connection with statewide football player contracts, and another involving very complex property laws claims.

6.5.4 Amount of the Claim

The designation 'small claims' is quite appropriate as the average amount of claim (mean) is \$808 as shown in Table 23.

Table 23: Amount of the Claim

VALUE IN DOLLARS	Freq	%	cum %
10-100	30	3%	3%
101-200	92	10%	13%
201-300	84	9%	22%
301-400	79	9%	31%
401-500	95	10%	41%
501-600	60	7%	48%
601-700	49	5%	53%
701-800	43	5%	58%
801-900	47	5%	63%
901-1000	47	5%	68%
1001-1100	32	4%	72%
1101-1200	22	2%	74%
1201-1300	24	3%	77%
1301-1400	26	3%	80%
1401-1500	35	4%	84%
1501-1600	28	3%	87%
1601-1700	18	2%	89%
1701-1800	23	3%	91%
1801-1900	16	2%	93%
1901-2000	60	7%	100%
Total	910		

- Notes:
- 1. Other types of relief requested, eg return of goods, declaration of no liability =10 unknown = 39; unavailable files = 42
 - 2. Median=630
 - 3. St Dev=573
 - 4. Mean=\$808

The large number of claims filed in the \$1900-\$2000 category no doubt represents higher potential claim amounts which were reduced by claimants to fit within the Small Claims maximum jurisdiction of \$2000.¹⁰⁷ The fact that significant numbers of claimants seem willing to sue for less than their actual damages in order to use the faster, and less expensive, Small Claims process is

¹⁰⁷ See NZ Study, Report 2, at ii (with a claim limit of \$500 the average amount of claim was \$242. The claim limit was raised to \$1000 from 8 March 1985. In the Iowa Study, at 493, the mean was \$613; The Mean in Victoria was \$639 (deVaus at 45).

an important measure for the need of such Courts. If one assumes that these claimants are making a rational choice of forum in which to sue, then we can infer that they believe they will get a fair hearing in Small claims Court with cost and time savings great enough to justify the possible additional damages recoverable in a formal civil Court proceeding. This conclusion was also confirmed by past and present full time Small Claims Magistrates¹⁰⁸ and several of the Registrars¹⁰⁹ in their response to the researcher's *Preliminary Report on Small Claims* presented to the Justice Department in April 1991.¹¹⁰

Finally, the significant number of cases for low dollar amounts (below \$500) suggests the need to investigate the feasibility and desirability of an abbreviated procedure for this type of case. However, one should proceed cautiously and be mindful of the fact that the importance of litigants having a chance to 'tell their story' is one of the most important determinants in litigant satisfaction with the Small Claims Court.¹¹¹

6.5.5 The Disputants

As indicated in Chapter Two one of the most frequent findings of previous Small Claims studies¹¹² is that Small Claims Courts and Tribunals have been

¹⁰⁸ Mr Hill and Mr Hemming.

¹⁰⁹ For example, Mr Paul Huxtable, Hobart Small Claims Registrar, Mr Viney, Burnie Registrar.

¹¹⁰ This was also the conclusion of Weller and Ruhnka, *op. cit.* 48.

¹¹¹ See also, section 12 of this chapter. See generally, Conley and O'Barr, *op. cit.*

¹¹² Most of the earlier Small Claims studies involved systems in collection agencies were permitted to use the system. In this context, these studies reported that businesses represented the majority of plaintiff utilising Small Claims procedures. See e.g. Iowa Study, at 433, 484 (found 62% of the plaintiffs were businesses); Ruhnka and Weller, at 42 (majority of cases in Courts permitting collection agencies were businesses); F. Haemmel, 'The North Carolina Small Claims Court--An Empirical Study', (1973) 9 *Wake Forest L. Rev.* 503, at 506 (plaintiffs were corporations in up to 82.7% of the cases); R. Purdum, 'Examining the Small Claims Court: A Florida Case study' (1981) 65 *Judicature* 25, at 27; R. Scobey, 'The Big Problem with Small Claims: An Empirical Analysis of the Providence Small Claims Court,' (March 1980) 27 *RIBJ* 3, at 3 (over 90% of the cases initiated by businesses); Note, 'Ohio Small Claims Court: An Empirical Study,' 42 *U. Cin. L. Rev.* 469, at 479 (businesses constituted 89% and 74% of sampled cases); Massachusetts Public Interest Research Group, Inc, 'The Plight of the "People's Court": An Analysis of Massachusetts Small Claims Courts,' (1982) (unpublished paper), at 11-12 (concluded Court dominated by businesses). *But see* M. Alexander, 'Small Claims Courts in Montana: A Statistical Study,' (1983) 44 *Mont. L. Rev.* 227 (Small Claims Court utilised mostly by individuals); J. King, 'Measuring the Scales: An Empirical Look at the Hawaii Small Claims Court,' (1976) 12 *Hawa. B.J.* 3, at 7 (81% of Hawaiian Small Claims Court plaintiffs were individuals).

dominated by business claimants who turn the Court into a debt-collection agency. Mindful of these studies, the Tasmanian legislation in its definition of 'small claim' states that it 'does not include a claim for a debt or a liquidated demand where there is no dispute as to the liability for payment of the debt or demand, either in whole or in part.'¹¹³ This provision has ensured that Tasmania's Small Claims Court has not been turned into a Debtor's Court dominated by business claimants.¹¹⁴

As shown in Table 24 below, the majority of claims involve individuals against other individuals. One must caution however, that these figures over-represent the number of individuals and under-represent the number of business claims. This is because many individual claims are, in reality, insurance company claims brought as a result of a motor vehicle accident. Also, many business are not incorporated, and the Court file did not always make it clear that the dispute was one involving a business. The interview data¹¹⁵ also support the conclusion that there is no significant problem of abuse of the Small Claims procedure by debt collectors. Observations of the Registrar and Court staff in action on the counter also revealed that they were sensitive to the requirement that there be a legitimate dispute and claims were reviewed to ensure this requirement was met. One of the Consumer Affairs officers¹¹⁶ suggested that some business claimants

¹¹³ *Magistrates Court (Small Claims Division) Act 1989 (Tas)*, s 3(e).

¹¹⁴ In his second reading speech for the Court of Requests (Small Claims Division) Amendment Bill 1986, then Attorney-General John Bennett stated:

'The Small Claims Division was not designed and not intended to be used for debt collection. It was designed to resolve disputes between parties. However the provisions of the act do not prevent claims for debt being filed in the division. Such claimants are advised by Registry staff that if there is no dispute involved the appropriate Court is the Court of Requests. The procedures of the division are a disincentive for debt collection. There is no default procedure, the claim must proceed to a hearing and costs are not recoverable. Despite this, debt collection claims are made. In addition the issue has caused a number of problems for registry staff. Therefore the opportunity has been taken to include in the bill and amendment to exclude debts or liquidated demands from the jurisdiction of the Small Claims Division unless there is a dispute involved.' J. Bennett, Tasmanian House of Assembly, 'Second Reading, Court of Requests (Small Claims Division) Amendment Bill 1986, (Hansard) No. 3, 19 March 1987, at 622.Fortieth Parliament - Second Session 1987

¹¹⁵ See e.g. Personal Communication with Registrar Mr Paul Huxtable, 7 September 1990; see generally Summary of Interviews, *op. cit.* ss 3,4.

¹¹⁶ Focus groups discussion with Consumer Affairs, 5 July 1990, Summary of Interviews, *op. cit.* s 5.

'manufacture' a dispute in order to utilise the Small Claims procedure, but the evidence suggests this is not a widespread or significant occurrence.

Table 24: Nature of Persons Involved in the Dispute

Nature of Parties	Freq	%
Individual vs individual	633	67%
Business vs individual	126	13%
Individual vs business	124	13%
Business vs business	64	7%

Note 1. Unknown or unavailable: 55

The survey of Court files further shows that the total number of disputant listings containing the designations 'DBA' (trading as), 'Company,' 'Pty Ltd', 'Co' consisted of 105 claimants (10%) and 142 respondents (14%). Again, the evidence suggests that business (debt collector) interests do not dominate the Tasmanian Small Claims Court.¹¹⁷ The dominance of the Court by insurance companies, however, is another issue which is considered in section seven below.

¹¹⁷ Contrast Iowa Study, at 486, which found that individuals were much more likely to be defendants, and claimants were much more likely to be businesses. 47% of the cases involved Business vs individuals; 22% landlord vs individual; 15% business vs business and only 8% individual vs individual; and the remaining percentage other (at 487). Also the success rate for businesses when facing individual defendants was 95% as opposed to 85% success rate when both parties were businesses (at 508); The Victorian SCT requires that the dispute be between a consumer and a trader. DeVaus at 44 found that "the majority of claims (67%) were made either against individuals or small businesses. Large businesses were more likely to settle claims before the hearing than small businesses." Interesting, deVaus, at 113, also found that 'if the claim was against a large business the claimant was more likely to receive something from the hearing). See generally B. J. Graham and J. R. Snortum, 'Small Claims Court: Where the Little Man Has His Day,' (1977) 60 *Judicature* 260.

Table 25: Type of Claimant by Amt Claimed: (Percentages)

DOLLARS	1	2	3	4	TOTAL
10-100	2.29	5.88	5.31	5.17	3.33
101-200	9.48	16.0	9.73	3.45	9.98
201-300	8.66	15.1	6.19	8.62	9.2
301-400	8.66	10.9	8.85	5.17	8.76
401-500	11.0	10.9	6.19	12.1	10.4
501-600	6.54	5.04	9.73	3.45	6.54
601-700	5.88	2.52	4.42	8.62	5.43
701-800	4.58	4.2	6.19	3.45	4.66
801-900	5.07	6.72	2.65	6.90	5.10
901-1000	5.07	5.04	4.42	8.62	5.21
1001-1100	3.92	2.52	1.77	5.17	3.55
1101-1200	2.45	2.52	1.77	3.45	2.44
1201-1300	2.94	1.68	0.88	5.17	2.66
1301-1400	3.27	0.84	3.54	0	2.77
1401-1500	4.25	0.84	4.42	5.17	3.88
1501-1600	2.94	0.84	4.42	5.17	2.99
1601-1700	1.8	3.36	2.65	0	2.00
1701-1800	3.1	0.84	0.88	3.45	2.55
1801-1900	1.47	1.68	2.65	3.45	1.77
1901-2000	6.7	2.52	13.3	3.45	6.76
Total	100	100	100	100	100

Notes

1= individual vs individual; 2=business vs individual; 3= individual vs business; 4= business vs business; Again note that the number of individual vs individual claims are inflated because many are motor vehicle accidents brought in the name of an individual by an insurance company under subrogative rights.

Table 26: Nature of Claim by Amt of Claim: PERCENTS

DOLLARS	LL/T Contract		MV	Other	TOTAL
10-100	6.98	3.95	2.52	5.63	3.51
101-200	16.28	8.88	10.55	12.68	10.42
201-300	4.65	8.88	10.09	11.27	9.48
301-400	6.98	9.21	8.26	7.04	8.43
401-500	11.63	10.53	10.55	9.86	10.54
501-600	6.98	6.25	5.5	9.86	6.21
601-700	2.33	5.59	5.28	8.45	5.5
701-800	2.33	5.26	4.82	1.41	4.57
801-900	6.98	3.62	5.73	7.04	5.15
901-1000	4.65	4.93	5.28	8.45	5.39
1001-1100	6.98	4.61	2.52	2.82	3.51
1101-1200	6.98	2.3	1.61	0	1.99
1201-1300	6.98	3.29	1.38	5.63	2.69
1301-1400	0	1.97	3.9	1.41	2.81
1401-1500	0	4.61	3.9	2.82	3.86
1501-1600	0	3.95	2.98	0	2.93
1601-1700	0	2.3	2.52	0	2.11
1701-1800	0	3.62	2.29	1.41	2.58
1801-1900	4.65	0.99	2.06	1.41	1.76
1901-2000	4.65	5.26	8.26	2.82	6.56
Total	100	100	100	100	100

Note: The large percentage in the \$100-\$200 for Landlord/ tenant no doubt reflects the average amount of the bond required in residential tenancies.

6.5.6 Summary

The number of cases handled by the Tasmanian Small Claims Court has grown significantly over the past five years, with the greatest percentage increase being in the Launceston District.

Motor vehicle accident cases are assuming an increasingly larger proportion of the total cases filed in Small Claims, having gone from one third to almost one half of all cases filed.

The average amount of claim (mean) filed is \$808 suggesting that many cases filed in Small Claims are indeed 'small'. However, a significant number of cases are filed in which the claimed amount is the maximum of \$2000 thus suggesting that disputants have foregone part of their claim in order to come within the jurisdiction of the Small Claims Court. This in turn indicates that the

Small Claims system has proven to be an attractive alternative to the more traditional adversary Court procedure found in the Court of Requests. This also confirms a point also made by numerous researchers¹¹⁸ that the small claims, in many cases, are not to be equated with simple claims.

There does not appear to be any dominance of the Small Claims Court by business interests utilising the Court as a vehicle for debt-collection. However, the Court should investigate procedures to more readily discriminate those cases in which the claimant has a payment problem from those in which there is a substantive dispute. Finally, while the evidence is clear that the Tasmanian Court is not dominated by debt-collection interests, is it accurate to assume, as did earlier studies, that permitting debt collecting claimants to utilise the system results in a 'chilling effect' on other disputants, for example, consumers? No feature of Small Claims has attracted more heat and less light than the question of whether collection agencies should be allowed to utilise the Small Claims Court. Weller and Ruhnka point out that:

The battle lines that have been drawn on this issue are the most clear reflection of the transformation of the original goals of the Small Claims movement to the goals of the consumer movement.¹¹⁹

Those arguing in favour of collection agencies being allowed access to Small Claims state that the Court should be open to anyone with a dispute which falls within the Court's jurisdictional amount. Opposition¹²⁰ to collection agencies participating as claimants lies in the belief that Small Claims Courts should exist for individuals, and particularly for consumer claims. Also, there the fear is expressed that the use of Small Claims procedures by collection agencies would 'chill' the use of Small Claims by crowding out individuals.¹²¹ There is the

¹¹⁸ See e.g., Ingleby (1990) *op. cit.* 37; C. J. Whelan, *Small Claims Courts: A Comparative Study* (1990) (Oxford, Oxford University Press) at 126

¹¹⁹ S. Weller and J. Ruhnka, 'Small Claims Courts: Operations and Prospects, (Winter 1978) *State Court Journal* 4, Research Essay Series Number E006 (Williamsburg, Va, National Center For State Courts).

¹²⁰ See generally, R. Kagan, 'The Routinization of Debt Collection: An Essay on Social Change and Conflict in the Courts' (1984) 18 *Law and Society Review* 345.

¹²¹ Earlier studies regularly found that collection agencies and business plaintiffs dominated the use of Small Claims Courts. See B. Yngvesson and P. Hennessey, 'Small Claims, Complex Disputes: A Review of the Small Claims Literature,' (Winter 1975) (9)(2) *Law and Society Review* 236.

further argument that making Small Claims available for debt collection encourages fraudulent sales and credit practices.¹²² Weller and Ruhnka similarly found that in Courts where collection agencies were allowed, individual plaintiffs made up a small percentage of the cases. However, they also conclude that this suggested individuals were deterred from using the Court. In fact, when filing rates per head of population were examined, no relationship existed between permitting collecting agencies to use Small Claims Courts and a corresponding decline in use by individuals.¹²³

While not decreasing the number of individual filings, there is little doubt that participation by collection agencies does add significantly to the case load of the Court. For this reason some Courts have adopted special dockets and procedures to handle collection agencies as plaintiffs. Also, it must be realised that barring collection agencies from Small Claims Court forces them and the debtors to use the more expensive and more formal Court of Requests where the creditor, but often not the debtor, will be represented by an attorney.¹²⁴ Thus, perhaps the solution lies in adopting a default procedure, but one which is properly supervised so that the Magistrate is empowered to consider the interests of debtors as well and avoid abuses by either party. As Nader¹²⁵ suggests:

An ideal complaint -handling system would, with speed and fairness, resolve grievances and would be part of an early alert to head off future similar complaints by providing public agencies with data with which to do their jobs better. An ideal system would also disclose aggregate patterns of abuse or

122 This was because the easy default procedure often involved a minimum examination of the plaintiff debt collector's claim. See 'E. Steele, 'The Historical Context of Small Claims Courts', (1981) *American Bar Foundation Research Journal* 293,358-360; see also J. S. Wright, 'The Courts Have Failed the Poor' (9 March, 1969) 6 *New York Times Magazine* 110.

123 Weller and Ruhnka, *op. cit.* 5.

124 Weller and Ruhnka conclude that on balance 'the prohibition of collection agencies carries with it more dangers than rewards for individuals involved in these cases.' *Ibid.* 5.

125 L. Nader, 'Alternatives to the American Judicial System' in L. Nader (ed), *No Access to Law Alternatives to the American Judicial System* (1982) (New York, Academic Press) at 28.; see generally, L. Nader (ed), *No Access to Law Alternatives to the American Judicial System* (1982) (New York, Academic Press).

injustice and would provide people with a competitive number of private and public avenues and forums within which to pursue just treatment. It would work for prevention and deterrence.

There appears to be little support in Tasmanian for removing the bar which presently exists against collection agencies using Small Claims; and this is despite the fact that Court staff admitted to considerable interpretive difficulties regarding the definition of a 'claim'. The reason for this is threefold. First, the default procedure in the Court of Requests is already streamlined and simple procedure. In fact, Mr Huxtable¹²⁶ pointed out that a plaintiff debt collector filing serving their own papers could utilise the procedure for a cost of only \$10. Secondly, if the debtor appears to dispute the claim then the debtor is entitled to have the matter referred to the Small Claims Court. Finally, Mr Huxtable noted that there have been occasions when the registrar has had a word with particular claimants who seem intent on attempting to use the Court as a debt-collection device.¹²⁷

Finally, it must be recognised that if collection agencies are allowed to utilise Small Claims procedures that 'a majority of debtors do not have a legal problem but rather a payment problem, often caused by circumstances outside their control.'¹²⁸ Some commentators¹²⁹ have suggested that separate 'delegalised' procedures, incorporating counselling and mediation, which are more humane and reduce the coercive aspects of a 'Court' procedure are called for both in Small Claims and the Court of Requests.¹³⁰

¹²⁶ Personal Communication, 7 September 1990; See Summary of Interviews, *op. cit.* s 4.

¹²⁷ W. DeJong, *op. cit.* 10 (Other procedural restrictions which have been incorporated by other jurisdictions are: 1) placing a limit on the number of claims any party can file during a specified period of time; requiring heavy users to pay a higher fee; increasing the filing fee for successive claims; and limiting the number of cases of a single claimant which can be heard on a single day).

¹²⁸ I. Ramsay, 'Small Claims Courts in Canada: A Socio-legal Appraisal' 25, 42 in Whelan (1990), *op. cit.*

¹²⁹ See eg M. Adler and E. Wozniak, 'More or less Coercive Ways of Settling Debts', in H. M. Drucker and N. L. Drucker (eds) *The Scottish Government Yearbook* (1980) at 15.

¹³⁰ *Ibid* 43.

6.6 Defaults, Dismissals and Pretrial Settlements

6.6.1 Overview of Case Disposition

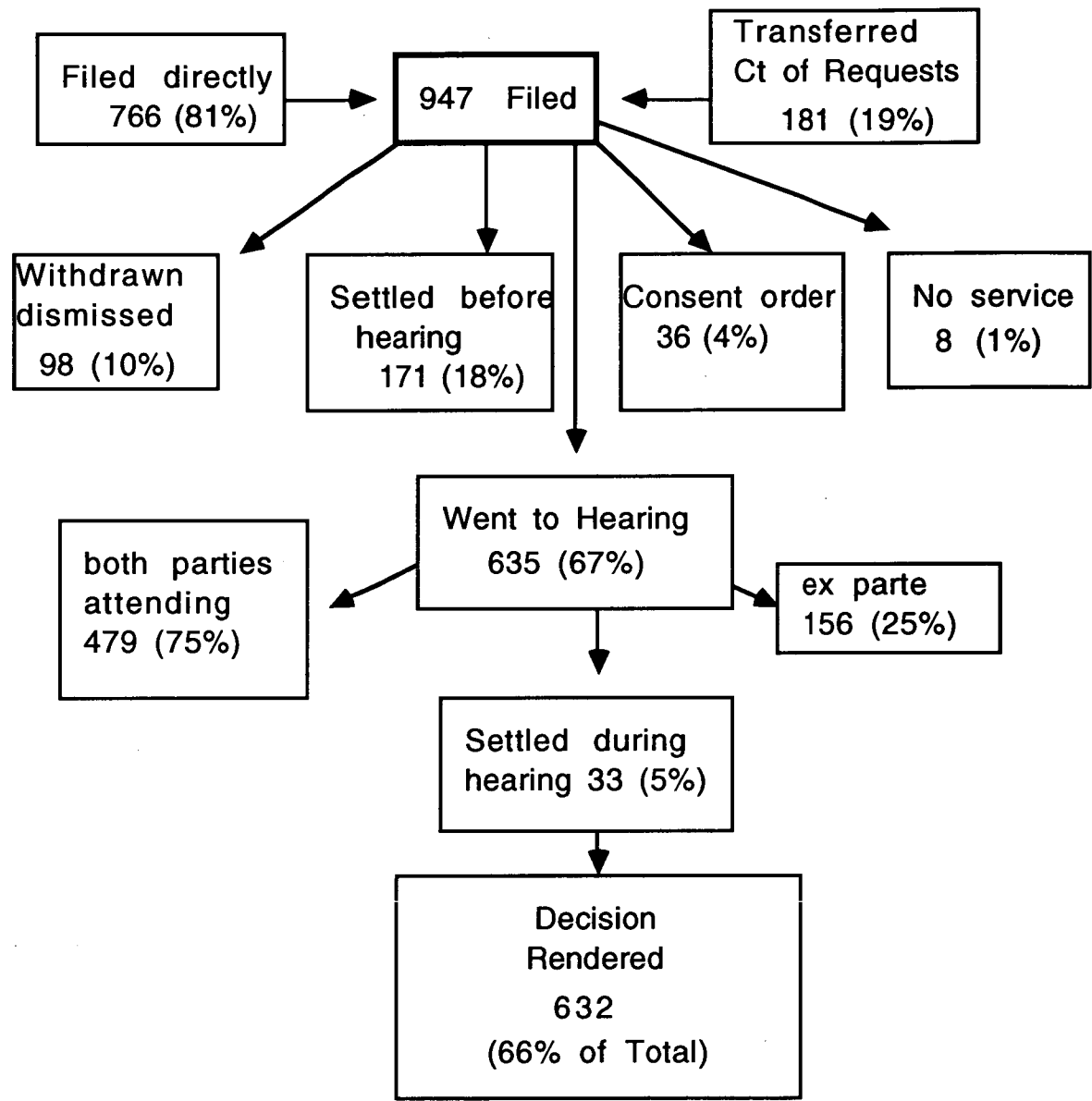
Small Claims Courts have been referred to by some writers as the 'multi-door'¹³¹ courthouse, suggesting that Small Claims Courts, more than their traditional counterparts, have more doors from which to choose and through which the disputants may find the appropriate procedure to resolve their dispute. This section examines the various 'doors', other than a formal Small Claims hearing, through which a small claim may proceed.

Based on the file survey, the chart below shows the disposition of cases which come before the Small Claims Court. One third of all cases filed are dismissed for one reason or another: Ten percent (10%) of the claims filed are withdrawn prior to the hearing, 22% were indicated as having settled, of which 4% were by consent order; and 1% were dismissed for failure to obtain service of process.¹³²

¹³¹ See 'Toward the Multi-door Courthouse: Dispute Resolution Intake and Referral,' *National Institute of Justice Reports* (July 1986) 2-3. See generally, S., E. D. Green and F. E. A. Sander, *Dispute Resolution* (1985) (Boston, Little, Brown and company).514-516.

¹³² Iowa Study, *op. cit.* 477, 37% of all cases were dismissed for various reasons, withdrawal by plaintiff, no service of process etc. (in period 1974-1986 clerks disposed of an average of 1.82 times more claims than judges!)at 477; De Vaus reported that 22% of all cases successfully settled and that including withdrawals about a third of all cases were settled by negotiation (at 96).

**Small Claims Case Flow
Hobart Fiscal Year '89**



Small Claims Flow Chart: Disposition of Cases Filed in Small Claims

6.6.2 Non-Attendance of the Claimant or Respondent

Based upon the file survey, in approximately a quarter of the cases scheduled for a hearing one of the parties, usually the respondent, did not show up to contest

the matter. This is a significant increase over earlier figures¹³³ which revealed that 15% of cases proceeded ex parte. However, looking at the figures for 90-91, the percentage of non attendance remains about the same. For example, the Registrar, Paul Huxtable reports that 96 of 367 (26%) of hearings between Jan to March 91 were ex parte.¹³⁴

Table 27: Ex Parte Hearings

<u>Ex parte hearings</u>	<u>Freq</u>	<u>%</u>
	156	24.6%

Notes: Total N: 635 cases which went to Hearing

The ex parte hearings raise a number of potential problems. First is the concern expressed by some writers¹³⁵ that many defaulting defendants may have a legitimate defence and that the Magistrate in a Small Claims may not require the claimant to prove their case. Defaults do not appear, however, to be a major problem in Tasmania because the default numbers are comparatively low¹³⁶ and the Magistrate requires that claimants demonstrate a prima facie case. In other words, even if the respondent does not show up to contest the claim, the Magistrate will nevertheless scrutinise the documentation, be alert for unfair practices that prejudice the respondent, and require the claimant to prove the claim. Finally, the fact that mere debt collections are not justiciable in the Tasmanian Small Claims Court helps to avoid many of the abuses of debt collection which have been documented in previous studies.¹³⁷

133 Former Small Claims Registrar, Barry Hamilton, *op. cit.* conducted an informal file survey for the first two years of the Court's operation.

134 Statistics from Paul Huxtable, Registrar, Tasmanian Small Claims Court, Hobart.

135 See e.g. I. Ramsay, 'Small Claims Courts in Canada: A Socio-legal Appraisal' in Whelan, *op. cit.* 25-48.

136 'Default rates in some Courts run a staggering 40 to 60%' DeJong, *op. cit.* 2. See also, B. J. Graham and J. R. Snortun, 'Small Claims Court: Where the Little Man Has His Day' (1977) *Judicature* 60; M. Minton and J. Steffenson, 'Small Claims Courts: A Survey and Analysis, (1972) *Judicature* 5.

137 See discussion in Chapters Two and Four.

In addition to the file survey which included all of the Hobart Small Claims cases and one third of those filed in the remainder of the State, the disputant questionnaire also asked if disputants attended the hearing. As in the file survey, almost a quarter of those answering the disputant questionnaire indicated that the respondent failed to appear for their hearing. The similar percentages reflected in the file and disputant surveys suggests that the sample of claimants who answered the questionnaire closely approximated the total population sample in this regard.

Table 28: Did Respondent Appear?

Response	Freq	%
<u>Yes</u>	<u>163</u>	<u>78.4%</u>
<u>No</u>	<u>44</u>	<u>21.1%</u>
<u>Don't know</u>	<u>1</u>	<u>0.5%</u>

- Notes
- 1. Base: claimants who attended
 - 2. No response: 14

Respondent responses to the same question, as expected, showed that in very few cases did the claimant not appear (Table 29). Interviews with Magistrates and Court staff suggested that the main reasons for claimants not appearing were: the decision to forego the claim, settlement before the hearing date, and forgetfulness.

Table 29: Did the Claimant Appear?

Response	Freq	%
<u>Yes</u>	<u>124</u>	<u>93.9%</u>
<u>No</u>	<u>8</u>	<u>6.1%</u>

- Notes
- 1. Respondents whose case did not settle prior to hearing
 - 2. No response/information: 13 (9.0%)

6.6.3 Application for a Rehearing

A party with a valid claim or defence, but who does not show up for the initial hearing, is entitled to request a rehearing Section 26(2) of the Tasmanian Act provides:

- (2) Where --
- (a) an issue in dispute has been determined in accordance with subsection (1); and
 - (b) the party that did not appear or give written evidence has, within 7 days after he receives notice of the determination, applied for a rehearing to a Registrar, the magistrate may order that the small claim to which the proceeding relates be reheard if it appears to him that it is just and reasonable to do so.
- (3) An order under subsection (2) shall, as determined by the magistrate--
- (a) be subject to such terms and conditions, including without prejudice to the generality of the foregoing, terms and conditions as to the payment of costs of a party other than the party on whose application the order is made; or
 - (b) be unconditional if the magistrate is satisfied that no substantial injustice will be thereby caused to the parties to the relevant proceeding.

Section 4 provides that where a Magistrate makes an order for a rehearing both parties shall be given notice of the time and place for rehearing and the original order ceases to have effect unless restored pursuant to section 5 discussed below.

Section 5 provides that if a party again fails to appear then the original order is restored to full force and effect.

Table 30: Did you Apply for a Rehearing?

<u>Response</u>	<u>CLAIMANT</u>		<u>RESPONDENT</u>	
	<u>Freq</u>	<u>%</u>	<u>Freq</u>	<u>%</u>
No	192	86.9%	15	93.7%
Yes	15	6.8%	1	6.8%

Notes:

- 1. No response 15 Claimants
- 2. Claimants were asked if they applied for rehearing after the case was heard. The base for Respondents was much more narrow. Only those who did not attend the first hearing were asked if they applied for a rehearing. This accounts for the significantly lower numbers of respondents answering the question.

In practice, Magistrate Hemming noted that if a party swears under oath, for example, that they did not receive notice of the hearing, he felt obliged for due process reasons to allow a rehearing. The low percentage of rehearings indicates that they are not a major problem in Tasmania. This in turn suggests that the system has achieved the proper balance between the right of party to be heard versus the inconvenience, delay and unfairness which are possible should a party have to come back a second time. The Magistrates interviewed recognised this as an area which required careful monitoring.¹³⁸

6.6.4 Number of Cases Settled

The figures from the file survey show that approximately a third of all cases filed in Small Claims are settled either before or during the hearing.

Table 31: Percentage of Cases Settled

what happened	Number	% of Total
<u>Settlement</u>	<u>204</u>	<u>25.3%</u>
<u>Consent order</u>	<u>36</u>	<u>4.5%</u>
Total settled	240	29.8%

Notes:
Of the 240 settlements 171 occurred before hearing; 33 during or after the hearing. 1002=Total. unavailable files=55; 7= no service of process; 97 dismissed; 602 resulting in a decision by the Magistrate

Most disputants report that they continue to try to settle even after the case is filed. This is supported by the figures in Table 31 above which show that 171 of 240 settlements occurred before the hearing.¹³⁹

¹³⁸ See e.g. Personal Communication with Magistrates Hill and Hemming, Summary of Interviews *op. cit.* s 3.

¹³⁹ Iowa Study at 478 (nearly all of plaintiffs surveyed and 77% of defendants; agreed to pay all original claim, 9% three fourths, 5% half; . Of these 68% actually received all, 16% received part, and 16% none).

6.6.5 Registrars' Conferences

Attempting to place greater emphasis on the role of the Court in the settlement of disputes, the 1989 *Small Claims Act* authorised Registrar's conferences--an informal settlement procedure (conference). The regulations empower the Registrar or his delegate¹⁴⁰ to hold a conference between the parties for the purposes of:

- '(a) defining and limiting the matters in dispute;
and
- (b) ensuring that the parties are taking all measures necessary for the hearing of the claim to take place expeditiously; and
- (c) assessing the time that is likely to be required for the hearing of the claim.¹⁴¹

Seven days notice in relation to the conference must be given to the parties, unless they agree to a shorter time.¹⁴² Further, 'if, during a conference, the Registrar believes that there is a reasonable possibility of settling a small claim by conciliation, the Registrar may seek to bring about an agreement between the parties.'¹⁴³ At such conferences, the parties are entitled to representation to the same extent and in the same circumstances as if the hearing were before a Magistrate.¹⁴⁴ The Registrar is also empowered to hold a conference by telephone.¹⁴⁵ An agreement between the parties reached at the Registrar's conference has the same force as a consent order.¹⁴⁶

This pre-hearing procedure thus has two major purposes: 1) to ensure that the matter is ready for hearing; and 2) to investigate the possibility of settling the

¹⁴⁰ *Small Claims Regulations (Tas)*, Rule 14

¹⁴¹ *Ibid* Rule 7.

¹⁴² *Ibid* Rule 8.

¹⁴³ *Ibid* Rule 9.

¹⁴⁴ *Ibid* Rule 10 and s 22 *Magistrates Court (Small Claims) Division Act 1989 (Tas)*.

¹⁴⁵ *Ibid* Rule 13.

¹⁴⁶ *Magistrates Court (Small Claims Division) Act 1989 (Tas)*, s 29 (2).

claim. Conferences are conducted by the Magistrate as well as other Court officers as permitted in the legislation.

Unfortunately, few Registrar's conferences had been undertaken at the time of this study, and even in 1990-91 Registrar's conferences were limited to Hobart. Plans are under way, however, to 'introduce conferencing as a regular procedure in the North and North-West.'¹⁴⁷ Though it is early days, both Court personnel and Magistrate appear to support such conferences and believe it satisfactorily resolved disputes and saved Court time.¹⁴⁸ All the Magistrates agreed this aspect of Small Claims required more emphasis.¹⁴⁹

The advantages of pre trial conferences conducted by the deputy Registrar were described by Mr Hill,¹⁵⁰ who was one of the initiators of the procedure.:

They (Melbourne) have a system where the Registrars would have a preliminary discussion with the parties, clarify the issues and get some idea of how long the matter would take, and see if the parties might settle. I set up a system, which is now in the regulations, where the Registrars would pick cases where there might be some hope of settlement. There's several advantages to these conferences: clarify the issues, see if the parties might settle, etc. Sometimes they would settle and I would simply make a consent order.

As more conferences are held it will be important to evaluate their success in facilitating settlement between the parties and educating disputants about Small Claims Court procedures. For example, one concern is whether Registrars and others conducting such conferences have been given the necessary training in mediation/conciliation techniques to maximise the advantages of such

¹⁴⁷ Letter of 2 August 1991 from David England, commenting on the Preliminary Report of March 1991.

¹⁴⁸ This was also true of Iowa Study, at 478-479.

¹⁴⁹ See e.g. Personal Communication with Magistrates Hill and Hemming, Summary of Interviews *op. cit.* s 3.

¹⁵⁰ Personal Communication with Magistrate Hill, Summary of Interviews, *op. cit.* s 3.

conferences and to avoid any abuses which may occur in such a setting.¹⁵¹ Second, even if Registrars have the necessary training, will they be supported by the Magistrates and legal profession in this new role?¹⁵² This is especially important given the fact that a significant number of disputants are referred to the Small Claims Court by their lawyers. Third, have adequate resources been given to allow Registrars sufficient time to devote to such conferences? Fourth, are the conferences sufficiently supervised by the Magistrate to ensure that abuses do not occur?¹⁵³ Fifth, will a network be established with other settlement alternatives whereby a case might be referred either to or from Small Claims as appropriate?¹⁵⁴ Sixth, while the Tasmanian scheme does not make such conferences compulsory in every case, what will be the criteria to determine the suitability of particular cases for such a conference procedure?¹⁵⁵ Seventh, will the Court impose a duty of good faith on parties who attend such conferences? If so, how will it be enforced?¹⁵⁶ Finally, will the time and expense of ensuring the proper use of such conferences be justified?¹⁵⁷ These are just a few of the complex questions which must be resolved before we can judge the success of this new procedure.¹⁵⁸

151 See Chapter Two and discussion in this section. See generally, Ingleby (1991), *op. cit.*.

152 *Ibid* at 89.

153 See discussion of role of conciliation/mediation in Chapter 4.

154 Sometimes the nature of the dispute; at other times, the nature of the parties may make a case more suitable to resolution by mediation as opposed to a hearing or vice versa. See New South Wales Law Reform Commission, 'Neighbour and Neighbour Relations' (Community Law Reform Program Discussion Paper 22, 1991) See also, W. Faulkes, 'Resolving Disputes: Community Justice Centres: The Mediation Process', a paper presented to the College of Law Continuing Legal Education Seminars, 15 May 1986 (College of Law, Sydney).

155 See Ingleby (1991), *op. cit.* 103, citing O.M. Fiss, 'Against Settlement' (1984) *Yale Law Journal* 1073, 1087; J. Folberg and A. Taylor, *Mediation: A Comprehensive Guide to Resolving Conflicts without Litigation* (1984) (San Francisco, Jossey-Bass) 309-311; and B. Landau, et al., *Family Mediation Handbook* (1987) (Toronto, Butterworths) 164-167.

156 Ingleby (1991), *op. cit.* 54-56.

157 *Ibid* at 102-103.

158 These questions will be tackled in a follow-up study planned for 1993.

6.6.6 Pre-hearing Settlement

As indicated in Chapter 3, the Tasmanian Act states that the primary function of the Small claims Court is to bring the parties to an agreed settlement.¹⁵⁹ Moreover, where the parties reach agreement themselves, the Magistrate must ensure that the parties understand the issues before giving a consent order.

Where a settlement is made under section 8(1) a magistrate shall make an order that gives effect to the terms of the settlement.

(2) A magistrate may--(a) on the written application of all the parties to a proceeding before him; and

(b) after considering the issues involved in the proceeding and being satisfied that the parties properly understand those issues, make a consent order with respect to that proceeding.¹⁶⁰

As discussed above, consent orders occur in about 5% of the cases.

Those parties whose cases are not resolved (via dismissals, withdrawals, consent orders, etc) prior to the day of the hearing will have a further opportunity to settle their dispute immediately prior to the commencement of the hearing. Observations of, and/or interviews with, the full time Magistrate, Mr Hemming, and Tasmania's first Small Claims Special Commissioner (now Magistrate), Mr Hill showed there to be a wide variety of styles and practices related to this settlement procedure.¹⁶¹ Some Magistrates, for example, Mr Hill and Mr Hemming, took a very active role in mediation while part-time Magistrates tended to be more formal and passive in their approach.¹⁶²

The first stage in the settlement part of the hearing involved an introduction of the forum so that parties know the nature and purpose of the settlement

¹⁵⁹ *Magistrates Court (Small Claims Division) Act 1989* (Tas), s 8.

¹⁶⁰ *Ibid* s 29.

¹⁶¹ Ingleby (1991), *op. cit.* 24 (Ingleby reported similar findings).

¹⁶² Personal Communication with Magistrates Hill and Hemming, See Summary of Interviews *op. cit.* s 3.

discussion.¹⁶³ Some Magistrates introduced this segment by pointing out to the disputants that the primary function of a Magistrate is to try to help the parties reach an agreement; and that it is only when the parties cannot themselves reach an agreement that the Magistrate would make a decision. Unfortunately, the Magistrate did not always make clear the distinction between these two stages as indicated on a few occasions when the disputants felt they had already told their story in the settlement discussion, and had to re-tell their story (under oath) for the hearing stage. Another aspect of this introductory stage involved the determination that the claim was properly within the jurisdiction of Small Claims and what type of remedy the claimant was seeking.¹⁶⁴ The full time Magistrates also tended to stress the fact that the parties were in the best position to know the facts and determine their own fate. Moreover, if the Magistrate had to make the decision it could be something that neither side wanted. Also emphasised was the finality of the Magistrate's decision from which there is no right of appeal.¹⁶⁵

Mr Hemming, and before him Mr Hill, tended to use a 'formula or patterned speech before trial which is remarkably similar to that utilised in Victoria¹⁶⁶ and recorded by Ruhnka and Weller.¹⁶⁷ Mr Hill¹⁶⁸ described his patterned speech in these terms:

¹⁶³ Ingleby (1991), *op. cit.* 21-28. (Ingleby reported similar findings).

¹⁶⁴ Ingleby (1991), *op. cit.* Chapter 5. Like Ingleby, the researcher found that some Magistrates emphasised that parties, in trying to reach an agreement, should focus on the remedy as opposed to the past history of the dispute. (as Ingleby quotes one referee: "I assume the only way the matter can be settled is in money... if you get into, 'he said she said' you'll go round in circles. You'll have to talk money") at 42.

¹⁶⁵ Personal observations of 50 Small Claims Cases in Hobart undertaken during 1990.

¹⁶⁶ *Ibid* at 22-23. See also, M. Levine 'Dispute Resolution in Small Claims Tribunals' in J. Mugford (ed), *Alternative Dispute Resolution* (July 1986) (AIC Seminar: Proceedings No. 15, (Canberra, ACT, Australian Institute of Criminology) 137. Levine notes (at 138-39) that: 'If the referee oversteps the bounds in trying to settle a case, the question of bias can arise. Accordingly, the Victorian referees have developed and followed a stylised and careful form of settlement. Information is given to the unrepresented parties as to:

- statistical chances of success (50/50 in defended cases);
- lack of rights of appeal;
- the benefit of settling without some third party imposing orders;
- the risks inherent in any proposed litigation; and
- other matters relevant to a possible settlement. '

¹⁶⁷ Ruhnka and Weller, *op. cit.* at 139-143 ('You are the people who are involved in this case and you know the facts much better than I do. Since you know the facts, you should try and work out a fair settlement which you both can agree on. As judge I do not know the real facts and I must make a decision as I see it based on your testimony.

What I used to tell people is that the primary function of the exercise is to settle and that it was all about dollars and cents and you had to put aside your bitterness and other problems and think about dollars and cents and forget about who is right and who is wrong. Now if you are talking about a motor vehicle accident where someone has left their car parked and another party has backed into them, it is pretty hard to get the guy who has parked his car to understand, why he should settle. So down here the settlement aspect doesn't fit tortious matters all that comfortably. So I said to the parties, look it's a money exercise, so calm down about it. If you make the decision yourselves you are more likely to live with it. I'll give you five minutes on your own to talk about it. If you can't settle by that time I'll come back and make a decision. At that point I walked out and let them go to it. Obviously there were times when you couldn't do that, for example when one party was aggressive and dominant.

As indicated by Mr Hill,¹⁶⁹ and supported by observations of and interviews with Mr Hemming,¹⁷⁰ suggestions for possible settlement in terms of dollars and cents are sometimes stated with an explanation that the parties may totally ignore the suggestion, make a higher or lower offer or do nothing. At all times the parties are reassured that they do not have to take any notice of the

This decision could go against either one of you, and might seem unfair to both of you, so it is best if you can work out an agreement between yourselves that you both think is fair.').

168 Personal Communication with Mr Hill, 7 February 1991, Summary of Interviews *op. cit.* s 3.

169 *Ibid.*

170 Personal Communication on several occasions with Mr Hemming. Observations were made of 50 Small Claims cases approximately two-thirds of which involved Magistrate Hemming.

suggestions and may proceed to hearing if they wish. A dollar amount is only stated to ensure that the parties talk to each other. This is because in many cases the parties will not be the first to mention settlement in a monetary sum unless a starting point is given.

Generally, the seeds having been sown, the parties are then left on their own to effect settlement. Indeed, in the course of my observations the full-time Magistrate never forced the parties towards conciliation, mediation, or settlement, but only suggested it as a possibility. The full-time Small Claims Magistrate especially was observed to use the full range of techniques to induce parties to settle.¹⁷¹ These included making a recommendation on one aspect of the dispute in hopes that the remainder will subsequently be resolved; suggesting that parties split the difference; urging parties to give and take in making-trade offs on various points; giving a quote to get things started, where neither party puts an offer on the table or in response to an offer.¹⁷²

The survey of disputants revealed that 70% of claimants and a majority of the respondents considered that the Magistrate was 'good' at attempting to bring the parties to a settlement (see Table 36 below). Interviews with supporting groups¹⁷³ also supported the view that the full-time Magistrate did an good job in helping the parties settle their disputes. They commented that Mr Hemming was very effective at using the preamble, before hearing, to put pressure on the parties to settle.¹⁷⁴ A major factor in this success is that, unlike Consumer Affairs, he has power of the Court to impose and enforce a decision.

The 'active' mediation style of Magistrates Hill and Hemming contrasted markedly with the passive 'hands-off' style observed of many part-time Magistrates. These Magistrates tended to inquire whether the parties had attempted to reach a settlement or whether they wanted a few moments to discuss settlement possibilities with each other before commencing the hearing. In tone and atmosphere the part-time Magistrates were more formal, neutral,

¹⁷¹ See generally, Ingleby (1991), *op. cit.*; Ruhnka and Weller, *op. cit.*, Chapter 9.

¹⁷² Ingleby, *ibid.* 83-89.

¹⁷³ These included Hobart Community Legal Service, Legal Aid, Consumer Affairs, etc. See Summary of Interviews *op. cit.* s 4.

¹⁷⁴ *Ibid.*

removed and passive.¹⁷⁵ Thus, in describing settlement procedures it is important to realise that there are differences between Magistrates within a given system as well as between different systems, a point to which we will return in section 6.6.7 below.¹⁷⁶

If settlement is reached the Magistrate ensures that the parties understand the agreement and that the agreement is binding. It is then recorded as an order of the Court. If a settlement does not eventuate, further attempts to settle may be made during the case and prior to a decision being given.

6.6.7 Advantages of Mediation/Conciliation

The definitional difficulties inherent in any discussion about mediation or conciliation were chronicled in Chapter 4. It is beyond the scope of this thesis to discuss in detail all the advantage of dispute resolution by mediation as opposed to an adversarial type hearing.¹⁷⁷ Observations of 50 Small Claims Courts hearings revealed that the full time Small Claims Magistrates, more than their part-time counterparts, were more supportive of and comfortable with their primary function of helping the disputants reach an agreement. The full time Magistrates, specifically appointed to adjudicate Small Claims cases, supported the view that one of the major advantages of mediation is that parties remain in a continuous working relationship.¹⁷⁸ An agreed settlement is also likely to be less traumatic in that both parties can consider themselves as 'winning'.¹⁷⁹

¹⁷⁵ Observations of 50 Small Claims Court hearings.

¹⁷⁶ See Levine *op. cit.* 139 (a tribunal is likely to be more actively 'involved' in settlement than a court. For example, the NSW Tribunal is far more interventionist than most Small Claims Court Magistrates would be).

¹⁷⁷ For a good discussion of advantages and disadvantages of settlement and ADR procedures generally, see H. Astor and C. Chinkin, *Dispute Resolution in Australia* (1992) (Sydney, Butterworths) chapter 2; See also, G. Clarke and I. Davies, 'ADR--Argument For and Against Use of the Mediation Process Particularly in Family and Neighbourhood Disputes' (1991) *Queensland University of Technology Law Journal* 81.

¹⁷⁸ See, e.g., Interview with Mr Hemming, *Summery of Interviews, op. cit.* s 3. See also, F. Feinberg, 'Mediation -- A Preferred Method of Dispute Resolution' (1989) 16 *Pepperdine Law Review* 5, 7; F. E. A. Sander, 'Family Mediation: Problems and Prospects' (1983) 2 *Mediation Quarterly* 3.

¹⁷⁹ See generally, H. Cornelius and S. Faire, *Everyone Can Win* (1989) (Sydney, Simon Schuster, Australia).

These Magistrates drew conclusions about mediation which are similar to those made by Terrence McFadgen:¹⁸⁰

What advantages does mediation offer? First, in psychological terms, it will generally be to the parties' benefit if their dispute can be resolved amicably. In many contexts it can prevent, 'the hasty' and groundless rupture of the bonds of friendship'. . . conciliation is, in this sense a *participant* rather than *principle* oriented process.

Similarly, other writers argue that the cooperative nature of mediation lends itself to more constructive conflict resolutions¹⁸¹ and that disputants are more likely to comply with an agreed settlement rather than an imposed Court order.¹⁸² It is also claimed that mediation is superior to adjudication in terms of disputant perceptions of fairness¹⁸³ and in ascertaining the facts of a dispute.¹⁸⁴ Other advantages of mediation relate to the inherent difficulties of Courts to solve certain types of cases.¹⁸⁵ For example, many Small Claims Courts have limited equity power and can only award monetary damages.¹⁸⁶

¹⁸⁰ T. McFadgen, 'Dispute Resolution in the Small Claims Context: Adjudication, Arbitration, or Mediation' unpublished LLM Thesis, Harvard Law School, 1972, 69.

¹⁸¹ See W. R. Evarts, J. Feather and L. Hack, 'Alternative Means of Dispute Resolution,' (1983) 21 *Patent Law Annual* 119-147'; R. Tomasic, 'Mediation as an Alternative to Adjudication: Rhetoric and Reality' in R. Tomasic and M. Feeley (ed) *The Neighbourhood Justice: Assessment of an Emerging Idea*, (New York, Longman) 215-248.

¹⁸² See C. McEwen and R. Maiman, 'Mediation in the Maine District Courts: An Empirical Study' (1984) 18 *Law and Society Review* 11 (67% of disputants who went through mediation as opposed to 59% who went through a court case, felt their settlements were fair); J. Pearson, 'Evaluation of Alternatives to Court Adjudication' (1982) *Justice System Journal* 7. See generally, J. Mugford (ed) *Alternative Dispute Resolution*, (1986) (Australian Institute of Criminology) 50.

¹⁸³ R. Davis, M. Tichane, and D. Grayson, *Mediation and Arbitration as Alternatives to Criminal Prosecution in Felony Arrest Cases: An evaluation of the Brooklyn Dispute Resolution Center (First Year)* (1980) (New York, Vera Institute of Justice) (77% of complainants 79% of defendants in the mediation sample perceived the case outcome as fair compared with 56% of claimants and 59% of defendants in the Court sample).

¹⁸⁴ See for example McEwen and Maiman, *op. cit.* (81% of the disputants stated they felt the mediator understood what the dispute was about, as opposed to 65% of persons whose case was processed by the Courts).

¹⁸⁵ DeJong, *op. cit.* 2.

¹⁸⁶ *Ibid.* See also, Astor and Chinkin, *op. cit.* 37-39.

Secondly, Courts must focus on the nature of the complaint and are unable to probe and deal with an underlying non-legal problem which is the root cause of the dispute.¹⁸⁷ Third, judges, with little or no mediation training, often find it especially difficult to deal with a personal conflict between the parties.¹⁸⁸ The resolution of many disputes requires a compromise decision which can sometimes be difficult for Courts which tend to have a "winner-take-all" orientation.¹⁸⁹ Fourth, the heavy case load under which many Small Claims Magistrates must operate, can mitigate against taking the time required to bring parties to a settlement of their dispute.¹⁹⁰ Finally, given the need for training and difficult task of effectively facilitating settlements, one must ask whether the time might be better spent on other activities.¹⁹¹ These are difficult questions which will require further research in the years ahead. Finally, it is argued that mediation as a method of dispute resolution is more flexible,¹⁹² and can save time¹⁹³ and money¹⁹⁴.

The research supporting the above claims, however, is inconclusive and much work remains to be done and the state of knowledge about conciliation/mediation is still in its embryonic stages.¹⁹⁵ For example, it is difficult to quantify many of the alleged savings claimed for ADR methods; and other costs may not have been included, eg, costs of the participants in time off from paid employment. It is also unrealistic to compare mediation to adjudication, given the fact that the vast majority of cases which come to the Courts are themselves settled. There are also counter-arguments which

187 *Ibid.*

188 *Ibid.*

189 *Ibid.*

190 *Ibid.*

191 See generally, Ingleby (1991), *op. cit.* 101-104.

192 See M. J. Fulton, *Commercial Alternative Dispute Resolution* (1989) (Sydney, Law Book Co) 90.

193 See generally G. Pears, *Beyond Dispute: Alternative Dispute Resolution in Australia* (1990) (Melbourne, Corporate Impacts Publications Pty Ltd).

194 *Ibid.* See also, R. Collins, 'Alternative Dispute Resolution--Choosing the Best Settlement Option' (1989) 8 *Australian Construction Law Newsletter* 17,18, cited in Astor and Chinkin, *op. cit.* 43.

195 D. McGillis, *Community Dispute Resolution Programs and Public Policy* (1986) (Washington D.C., National Institute of Justice) 71.

highlight the disadvantages of mediation and conciliation. These are discussed in the sections which follow.

6.6.8 Differing Expectations Regarding Settlement

As seen above, different Magistrates appear to have different expectations of the settlement role and process.¹⁹⁶ Furthermore, the empirical research to date suggests that requiring judges to attempt to mediate a case before conducting a trial has met with mixed success.¹⁹⁷ One reason for this mixed success lies in differing perceptions of the judicial process: the 'traditionalist' view of Courts as legal decision makers versus the 'adaptationist view' of Courts as agents of conflict resolution and social welfare.¹⁹⁸

These different expectations of the Court's function are seen in the disputants' comments. Disputants were provided with two statements and asked to indicate which best described what they wanted to happen at the hearing before it started. This was in order to ascertain the extent to which the aim of the Small Claims procedure in reaching an agreed settlement is consistent with the preference of the disputants. Two thirds of claimants and 58% of respondents stated that they wanted the Magistrate to make a decision, while less than a third of claimants (28%) and respondents (33%) wanted to reach an agreement with the other disputant (Table 32).¹⁹⁹

¹⁹⁶ See e.g., D. Carlson, 'Ethical Responsibilities of a Mediator: The Case for Intensive Mediation' Prize Paper, Harvard Law School, 1984, cited in Borrelli, *op. cit.* 291. (Carlson argues that even quite intensive mediation will provide the parties. greater voluntariness than adjudication).

¹⁹⁷ See M. Borrelli, *ibid* 263, Consumer Council, *op. cit.* 25; F. H. Myers, 'The Small Claims Court in the District of Columbia' (May 1983) 23 *The Annals of the American Academy of Political and Social Science* 287. For a strong case against the judge as conciliator see T. Eckhoff, 'The Mediator and the Judge' in V. Aubert (ed), *Sociology of Law, Selected Readings* (1969) (Baltimore, Penguin Books) 171-181.

¹⁹⁸ J. Lieberman (ed), *The Role of Courts in American Society* (1984) (St Paul Minnesota, West Publishing Company) at 83-86.

¹⁹⁹ In the NZ Study, at 52 (36% of claimants and 29% of respondents wanted to reach an agreement with the other party).

Table: 32 What the Disputant Wanted to Happen at the
Hearing Immediately Before it Started

Response	CLAIMANTS		RESPONDENTS	
	Freq	%	Freq	%
Agreement with other party	56	27.5%	42	32.8%
M to make dec	136	66.7%	74	57.8%
Other	12	5.8%	12	9.4%

Notes

1. Base: all disputants attending hearing
2. no response: 18 claimants; 17 respondents

This is one of the major surprises of the study and cause for some concern, especially since the Small Claims legislation states that the major role of the Magistrate is to attempt to get the parties to settle their dispute. Perhaps part of the reason that parties prefer the Magistrate to make a decision is that by the time a case reaches Small Claims, the parties, in many cases, have already tried to settle their case and thus are fairly entrenched by the time they get to Court.²⁰⁰ Perhaps also, this finding reflects the findings of other studies which show that, despite the popularity and argued advantages of ADR, few disputants voluntarily resort to ADR methods.²⁰¹ It may also be the case that many disputants have a preference for and an expectation of dispute processing which is adversarial.²⁰² Such disputants are likely to criticise mediation

200 This is confirmed by who Borrelli suggests that going to Small Claims is often the last desperate attempt by a claimant to force the respondent to be reasonable. Even then, she found many defendants either ignored the summons or refused to pay. See M. Borrelli, 'Small Claims, Smaller Satisfaction? An Analysis of the Small Claims Court from the Litigants' Perspective' Unpublished PhD Dissertation, Harvard University, 1989, 75.

201 Astor and Chinkin, *op. cit.* 42; J. Rieker, 'Alternative Dispute Resolution in Australian Commercial Disputes--Quo Vadis? (1990) 1 (1) *Australian Dispute Resolution Journal* 31-45.

202 *Ibid.* Abel also notes that the problem with non Court alternatives is that they may result in a second class system of justice, which suggest that Courts are only for more important, often commercially dominated matters.

because of its lack of enforcement and neutralising effect on the demand for justice.²⁰³

Those disputants who come to Small Claims expecting to reach an agreement may also be expecting more than the Court can, within the limits of the law, deliver. The dictate that the Court must apply the law coupled with the sociological background of those who work there place severe constraints upon its ability to remedy many of the structural inequalities which exist in society. Accordingly, the fact the major users of Small Claims are the highly educated says as much about the limitations of society as a whole as it does about the Small Claims Court.

These points suggests that Court officials and policy makers must give further attention to the mediation and conciliation roles of Small Claims. However, any changes should be made cautiously because, as demonstrated in section 12 below, the vast majority of disputants were satisfied with their Small Claims experience and would use the system again. It would appear therefore that Small Claims Court has the balance right. Mediation is encouraged, but adjudication and Court enforcement is there too should the parties want it.

Part of the explanation for different expectations amongst disputants no doubt also lies in the psychological attitudes of the litigants themselves - an aspect which has been the subject of recent investigations by Vidmar,²⁰⁴ Wissler,²⁰⁵ and McEwen and Maiman.²⁰⁶ Also, Laura Nader²⁰⁷ found that some plaintiffs may go to Small Claims in order to develop a support network, finding others who will sympathise and help in the resolution of their dispute. This is an area which should be the focus of future research. The focus of the present study,

²⁰³ *Ibid.*

²⁰⁴ N. Vidmar, 'Research Note: Assessing the Effects of Case Characteristics and Settlement Forum on dispute Outcomes and compliance' (1987) 21 *Law and Society Review* 155-164 (discusses how litigants formulate their claims and measure their victories).

²⁰⁵ See R. L. Wissler, 'Disputants' Assessments of the Process and Outcomes of Mediation', unpublished PhD dissertation, Boston University, 1986 (investigated the psychological attitudes that predispose litigants to favour mediation or adjudication).

²⁰⁶ C. A. McEwen and R. J. Maiman, 'Mediation in Small claims Court: Achieving Compliance Through Consent,' (1984) 18 *Law and Society Review* 11-49.

²⁰⁷ L. Nader, 'Disputing Without the Force of Law' (1979) 88 *Yale Law Journal* 998.

however, is on the performance of the institution as a whole while taking into account participants' perceptions of the various processes. Also note that the psychological makeup and attitudes of the disputants have much to do with whether they are predisposed to settle.²⁰⁸ Depending upon the party's motives, the likelihood of a successful outcome via mediation will be affected. One must therefore allow for the fact that parties may settle for many different reasons. They may be tired, they don't know what the judge will do, they expect to lose, can't be bothered, etc.²⁰⁹

Finally, perhaps there is a general tendency to expect too much from mediation and conciliation. Proponents of mediation argue that it is more likely than adjudication to get at the root of a problem.²¹⁰ Thus mediators are trained to seek to understand why something happened as much as what happened. However, in practice, the extent to which this occurs is debatable.²¹¹ Mediation appears especially inappropriate to multi-party disputes. It is also argued that mediation really teaches those without power to accept the structural inequalities which exist in society. It does not overcome them; it does not get at the root sociological and psychological causes of disputes.²¹² Indeed by privatising the conflict, giving the party the opinion that the dispute can be resolved individually, the dispute belongs to the individual, to work out. In doing so the individual is blamed for what otherwise may be societal, structural problems. As Singer noted:

[T]he need for a collective response or policy transformation cannot be achieved through individualised dispute resolution. . . the political dimension of these injustices is excluded when

208 See generally, R. L. Wissler, 'Disputants' Assessments of the Process and Outcomes of Mediation', unpublished PhD dissertation, Boston University, 1986.

209 See J. M. Haynes, 'Mediated Negotiations: The Function of Intake' (October 1984) *Mediation Quarterly* 6.

210 See generally, Clarke and Davies, *op. cit.*

211 See generally, Ingleby (1991), *op. cit.*

212 See generally, R. Abel, *The Politics of Informal Justice, Volume I: the American Experience* (New York, Academic Press).

translated into a misunderstanding resolvable by negotiation and the avoidance of conflict.²¹³

6.6.9 Agreed vs Imposed decisions

Here I compared the responses to the question of what disputants wanted to happen (Magistrate to make a decision or to reach an agreement with the other party) with what disputants stated actually did happen. In the vast majority (71%) of the cases, there was agreement. In other words what disputants wanted to happen, happened. In other words, there was a self fulfilling prophecy effect here.

When one considers the settlement (agreement) versus Magistrate made decision, however, there was a statistical difference in whether the disputants would use the Small Claims Court again. In 100% of the cases where the result was by agreement, the disputant stated that they would use the system again. However, in only 70% of cases where the Magistrate imposed a decision the participants said they would use the Court again. There was no significant difference between the groups in respect of the opportunity to present a case and whether the decision was perceived to be fair, whether the party compromised more than intended or more than was judged fair.

There thus appears to be a greater satisfaction level on the part of disputants when they feel that the result of their Small Claims experience was that they reached an agreement with the other party, as opposed to the Magistrate making a decision.

6.6.10 Problems with Mediation/Settlement

Presently there are a number of potential problems associated the role of settlement/conciliation in Small Claims. Firstly, not all disputes are equally suitable for mediation. This is especially true of contexts in which there is a power imbalance.²¹⁴ Power imbalances have been the focus of much

²¹³ Singer, *op. cit.* 576.

²¹⁴ See e.g., Davis, A. and Cohen, R., *Mediation: An Alternative That Works* (2nd edn) ((1984) (Salem, Massachusetts, District Court Department of the Trial Court of Massachusetts) (A. Davis, and R.A. Salem, 'Dealing with Power Imbalances in the Mediation of Interpersonal Disputes', (December 1984) *Mediation Quarterly* 17.

research,²¹⁵ a major concern being that judges, especially if they are passive and unsympathetic, might not use their power to redress those imbalances. As Singer²¹⁶ notes:

It is generally agreed that mediation between parties of significantly unequal power is inappropriate. For example, even where disputes are between individuals, no responsible mediator would attempt to mediate between a child abuser and the victim of the abuse. Where institutions are concerned, the question is whether significant leverage can be developed to equalise the power of disputants to the point where mediation becomes a realistic alternative.

Secondly, even when there are no power imbalances between the parties, coercion or pressure may nevertheless exist.²¹⁷ Having judges, clerks and others recommend that parties engage in settlement discussions places pressure on the parties.²¹⁸ This is especially true for those disputants with little

²¹⁵ See A. Davis and R. Salem, *ibid* 17-26; B. Moulton, 'The Persecution and Intimidation of the Low-Income Litigant as Performed by the Small Claims Court in California (1968-69) 21 *Stanford Law Review* 1665-69 (shouldn't presume the judge will use his or her power to redress power imbalances).

²¹⁶ L. Singer, 'Non-judicial Dispute Resolution Mechanisms: The Effects on Justice for the Poor' (December 1979) *Clearinghouse Review* 569, 574.

²¹⁷ See J. S. Auerbach, 'Alternative Dispute Resolution? History Suggests Caution' (1984) 28 *Boston Bar Journal* 37-40; J. S. Auerbach, *Justice Without Law?* (1983) (New York, Oxford University Press) 115-137. See e.g. O. Fiss, 'Against Settlement,' (May 1984) 93 *Yale Law Journal* at 1075 ('I do not believe settlement as a generic practice is preferable to judgment or should be institutionalized on a wholesale basis. It should be treated instead as a highly problematic technique for streamlining dockets. Settlement is for me the civil analogue to plea bargaining; Consent is often coerced, the bargain may be struck by someone without authority; the absence of a trial and judgment renders subsequent judicial involvement troublesome; and although dockets are trimmed, justice may not be done. Like plea bargaining, settlement is a capitulation to the conditions of mass society and should be neither encouraged nor praised.'). See also, M. S. Ball, 'The Play's the Thing, An Unscientific Reflection on Courts Under the Rubric of Theatre', (1975-76) 28 *Stanford Law Review* 115; J. Folberg, 'A Mediation Overview: History and Dimensions of Practice' (September 1983) *Mediation Quarterly* 3-13.

²¹⁸ R. Ingleby, 'Why Not Toss a Coin' (1989) (Carlton South, Victoria, AIJA Conference Paper); D. Gould, Staff Studies No. 3, Prepared for the National Institute of Consumer Justice 6-7 at 160-66 (1972) (judge or arbitrator inevitably coercive when attempt is made to settle; Note, 'Small Claims Courts: Reform Revisited,' (1969) 2 *Colum. J. L. & Soc. Probs.* 47, at 54; Massachusetts Standards of Judicial Practice: Small

experience or knowledge of their rights.²¹⁹ Indeed, recent research from other countries suggests that court-based mediation is likely to conflict with the aims of mediation and that many disputants will feel intimidated, coerced into settling by the mere presence of a judge, Registrar or other Court official.²²⁰

Third, there is the potential for conflict which results when a hearing is conducted by the same Magistrate who earlier had attempted to bring the parties to a settlement. Opinion is also divided on whether the same Magistrates should be involved in attempting to settle the cases and (in the case of no settlement) hearing the same matter. However, perhaps there is less worry of coercion for the Small Claims Magistrate who, unlike the mediator unconnected to a Court, is bound by the law. The mediator can also experience cross pressures in learning about the litigant. This information learned about the party can be used to place pressure on a party to conform thereby sidestepping due process.²²¹ There is also the danger that a Magistrate can be unduly influenced by the failure of a party to settle and thus find that knowledge and impressions developed in the settlement stage colour the perception of that party during the hearing stage. While acknowledging the perceived problems with settlement by the same person who decides the case, it can be argued that the 'stylised' form' of mediation utilised in Small Claims succeeds in avoiding most of the perceived problems.²²² Interviews with the Magistrates revealed that they were sensitive to the potential coercion problems associated with settlement attempts which might result in a respondent with a good defence, who waives it, or a claimant who should win 100% of their claim, settles for a lesser percentage.²²³ As indicated by Magistrate Hill:

Claims 5:03 (judge may inquire about possibility of settlement, but all settlements 'should be entered into only voluntarily and never "forced" by the Court').

²¹⁹ See generally, Fiss, *op. cit.* 1087.

²²⁰ See G. Davis and K. Bader, 'In Court Mediation: The Consumer View' (1985) 15 *Family Law* 42-49; Astor and Chinkin, *op. cit.* 48; S. Roberts, 'Three Models of Family Mediation' in R. Dingwall and J. Eekelaar (ed), *Divorce, Mediation and the Legal Process* (1988) (Oxford, Clarendon Press) 148.

²²¹ See J. Solomon, 'To Cut Backlog, an Ohio Court Tries Mediation' (19 May 1986) *The Wall Street Journal* 45.

²²² Levine, *op. cit.* 139

²²³ See generally, I. Ramsay, *Debtors and Creditors: A Socio-Legal Perspective* (Abingdon: Professional Books).

In fact I have always had conceptual difficulties with the Tasmanian model because if you talk to people about settling and then they say we can't and you have to decide it. Then in their eyes, some think you are biased. Then you have to decide in accordance with the law. Yet if you were privately advising them about the law your advice might be they shouldn't settle. I found that difficult to weigh up. I don't think you can do anything about it. It's a philosophical problem but it's one which makes it difficult for Commissioners and I know that Magistrates, who over a period of time have adjudicated Small Claims, have great difficulty with that concept. I suppose that while I had this conceptual difficulty, in practical terms I didn't let it affect the way I ran the Court. So I didn't let people know I was having these philosophical problems with the legislation. That's the last thing they want to know about.

These problems associated with possible pressures faced in the settlement context, especially by inexperienced disputants,²²⁴ are arguably lessened by mediation sessions with Court officials and/or lay advocates.²²⁵ While having a Registrar conduct a settlement conference rather than the Magistrate resolves the possible conflict of interest problem, such conferences themselves are subject to other difficulties. First, at present there are not enough conferences ordered. This is seen as a resource problem. Most of the Small Claims support staff have many other duties in connection with Small Claims and the Court of Requests. Thus, the time they have available to devote to conferences is extremely limited. The second problem is expertise: Staff, including the Magistrate, have been given no training in conciliation/mediation techniques. Moreover, it is difficult to develop an expertise in the area when it is done on such a fragmented basis. A

²²⁴ Ruhnka and Weller, *op. cit.* 143

²²⁵ B. Yngvesson and P. Hennessey, 'Small Claims, Complex Disputes: A Review of Small Claims Literature,' (1975) 9 *Law and Society Review* at 260-261.

third difficulty involves the issue of cost to the disputants. This was highlighted by Magistrate Hill:

If you have people coming for a conference and the other side doesn't show, you significantly add to the cost of a Small Claims dispute. I can see the argument, especially if you have someone travelling in from Huonville or somewhere like that, and the other party doesn't show, you've wasted a whole day. Putting that to one side I still thought it (Registrar's conference) to be a useful concept.

Fourth, there is the concern that Registrar's conferences must be properly supervised by the Magistrate to ensure that justice is done and that problems of coercion do not occur.²²⁶

6.6.11 Disputant Perceptions about Compromise and Settlement
In order to understand a little more about the settlement aspect of Small Claims, the disputants were asked a number of questions. First, how prepared were the disputants to compromise the claim in dispute? Table 33 shows that most disputants (58% of claimants; 60% of respondents) had made up their mind before the hearing as to how much they were prepared to compromise.²²⁷

Table 33: Whether Disputant Had Made Up Mind About How Much to Compromise

Response	CLAIMANTS		RESPONDENTS	
	Freq	%	Freq	%
Yes	118	58.4%	75	59.5%
No	84	41.6%	51	40.5%

- Notes
- 1. Base: disputants attending hearing
 - 2. No response: 20 claimants; 19 respondents

²²⁶ For a defence of the mediator's need to examine the agreement between the parties, see M. Borrelli, 'Settlement and Mediator Review,' (February 1986) 1 *The Alternative* 3-6; See also, G. Nicolau and G. W. Cornick, 'Community Disputes and the Resolution of Conflict' (1972) 27 *Arbitration Journal* 98-112.

²²⁷ These figures were higher than found in NZ, Study at 53 (39% of claimants and 47% of respondents).

Of those who stated they had made up their mind, 32% of claimants and almost half (46%) of respondents actually compromised more than they intended.²²⁸ These percentages no doubt in part reflect the fact that in the give-and-take of settlement discussions a party may become more informed of the strength of the opponent's case and see weaknesses in one's own. Also, the fact that the Magistrate, after settlement failed and a hearing on the merits, did not award an amount which matched or bettered that which the party thought they were entitled to would also influence this question.

Table 34: Did Disputants Compromise More than Intended?

Response	CLAIMANT		RESPONDENTS	
	Freq	%	Freq	%
Yes	47	32.2%	43	46.2%
No	99	67.8%	48	51.6%
Partial			2	2.2%

- Notes
- 1. Base: disputants who had decided how much to compromise
 - 2. Some answered this question even though not saying 'yes' to the previous question

However, there is also the possibility that compromising more than one intends is also the result of undue pressure. This possibility receives even greater force when one considers the responses to the question of whether disputants felt they compromised more than was fair. As shown in Table 35, almost half of the claimants and just over half of the respondents felt that they compromised more than was fair.²²⁹

Table 35: Did Disputant Compromise More than was Fair?

Response	CLAIMANT		RESPONDENT	
	Freq	%	Freq	%
Yes	73	47.4%	65	53.7%
No	81	52.6%	55	43.5%

- Notes
- 1. Base: disputants attending hearing
 - 2. no response: 68 claimants; 24 respondents

²²⁸ Compare NZ Study, at 54 (35% of claimants and 55% of respondents said they compromised more than intended).

²²⁹ Compare NZ Study, at 56 (42% of claimants and 52% of respondents stated they compromised more than was fair).

These results underscore the need for the adjudicator to carefully monitor Small Claims settlement negotiations to avoid possible coercive elements and ensure that settlements are the result of genuine agreement.²³⁰ It should also be borne in mind that for most of the disputants answering the above questions, the matter eventually went to hearing, and thus failed to settle. Thus the perceptions of the disputants were coloured by the result of the hearing. The responses of those disputants whose case actually settled²³¹ was far more positive. Two thirds of respondents and 69% of the claimants considered the settlement to be 'fair'.²³²

6.6.12 How Good Was the Magistrate in Bringing About Settlement?

How do disputants rate the Magistrate's skill in bringing about a settlement? As noted earlier, the settlement function is stated in the legislation to be the primary function of the Magistrate. Claimants and respondents were asked to indicate how good they thought the Magistrate/Commissioner was in trying to get them to agree to a settlement. As shown in Table 36, 70% of claimants and a majority of respondents considered the Magistrate did a good job in attempting to get the parties to settle the dispute.²³³

²³⁰ See Ingleby (1991), *op. cit.* 4. See also, J. A. Roehl and R. F. Cook, 'Issues in Mediation: Rhetoric and Reality Revisited' (1986) 41 *Journal of Social Issues* 161-78; Cf D. Carlson, 'Ethical Responsibilities of a Mediator: The Case for Intensive Mediation' Prize Paper, Harvard Law School, 1984, cited in Borrelli, *op. cit.* 291. (Carlson argues that even quite intensive mediation will provide the parties greater voluntariness than adjudication).

²³¹ See Appendices A3 and A4 for the survey questionnaires sent to those disputants whose cases settled prior to hearing. Unfortunately, the response to these questionnaires was so small and unrepresentative that the results must be interpreted with extreme caution.

²³² See responses to Question 8, Respondents' survey; Question 10 of the Claimants' Survey.

²³³ The NZ figures rated the referee higher (81% of claimants and 69% of respondents indicated the referee as good at attempting to get an agreement). However, like the Tasmanian figures, claimants were more favourable than respondents in their rating of the referee's ability to gain an agreement. NZ Study, at 29.

Table 36: How Good Was the Magistrate in Getting You to Settle?

Response	CLAIMANTS		RESPONDENTS	
	Freq	%	Freq	%
Very good	53	30.5%	30	23.6%
Quite good	69	39.6%	40	31.6%
Not very good	30	17.2%	28	22.0%
Not at all good	21	12.1%	29	22.8%
	174			

Notes

1. Base: hearings where both disputants attended
2. No response: 9 claimants.

Those disputants who indicated that the Magistrate/Commissioner was not good at trying to get the parties to agree, were asked to state in what ways this was so. Unfortunately, the numbers involved are so small and the reasons given so varied that any generalisation would be highly speculative. The reasons given were:

Table 37: Reasons Why Claimants Felt Magistrate Was Not Good at Settlement

Response	Freq	%
50-50 mentality	13	24.0%
Didn't understand dispute	10	18.5%
Too aggressive	8	14.8%
Prejudiced	7	13.0%
Didn't listen	4	7.4%
Expected too much, too formal	4	7.4%
No enforcement	2	3.7%
Failed	1	1.9%
Dragged on too long	1	1.9%

Notes

1. Base: cases where both disputants attended hearing
2. numbers are so small that percentages should be treated with caution

Table 38: Reasons Why Respondents Felt Magistrate Was Not Good at Settlement

Response	Freq	%
Didn't try	16	27.1%
Prejudiced	15	25.4%
Too aggressive	10	16.9%
50-50 mentality	5	8.5%
Not understand dispute	4	6.8%
Didn't listen	4	6.8%
Expected too much, too formal	4	6.8%

Notes

1. Base: Respondents who state Magistrate was not good at trying to gain a settlement
2. No response/information: 7 (12%)

6.6.13 Need for Specialised Training

While trying to bring parties to settle their dispute is the primary aim of Small Claims, the Magistrates and Registrars responsible for this task have had no specialised training in mediation or conciliation techniques.²³⁴ But, do the Court officials involved perceive the need for training in this area? The answer to this question was an unequivocal, 'yes'. For example, Mr Hemming,²³⁵ made the following observation:

I probably started more legalistically than I do now. I spend more time on settlements now. I think I'm better at picking the people what are likely to settle than I was when I started. Then, I tried the same standard routine with everybody and really, felt, I had no experience to be able to tell where to go from the initial blank response or negative response from the initial request of settlement. These days I will tend to assess the parties better and be able to suggest something. As an example, in the old days, when I first started I used to go into a room and leave them to get on with it in terms of settlement which was

234 Personal Communication with Magistrate Hemming, Registrar, Mr Paul Huxtable and others. See Summary of Interviews, *op. cit.* ss 3,4.

235 *Ibid.*

invariable hopeless because they just sit there and argue with each other. So now I take a much more active part; I sit in with them and encourage them to the extent that I'll even suggest a figure for settlement and nine times out of ten that is the figure that will be settled upon.

Mr Hill, only other full-time Small Claims Magistrate in Tasmania's history reflected:

...if I had been better trained as a mediator, then maybe I would have had a greater number of direct settlements.

Another fundamental problem involves the principle of impartiality. In Tasmania, a role conflict exists between the duty of the Magistrate to attempt settlement, a task which requires an inquisitorial posture in which the Magistrate is actively involved. Should the negotiations fail, however, the case must then be heard in a more formal adversarial context involving sworn testimony, examination and cross examination in which the same Magistrate must assume a more impartial, adversarial posture. This role conflict is made even more dramatic in Tasmania because there is no right of appeal and one Magistrate hears the majority of Small Claims cases.

Again, as Mr Hill²³⁶ observed:

You see the fact that there is effectively no right of appeal in the Small Claims Court made it awkward. And it was even more so because I was the only one who did it. So no matter where you went, Burnie, Devonport, Hobart or Launceston, I was the same face you saw.

236 *Ibid.*

6.6.14 Relationship of Small Claims to other Dispute Resolution Procedures

As indicated in Chapter 4, in order to obtain a fuller understanding of the Small Claims Court one must also consider its relationship with other dispute resolution procedures by which settlement is likely to occur. In this regard, interviews with the Hobart Community Legal Service, Legal Aid and Consumer Affairs revealed a symbiotic relationship with Small Claims.²³⁷ The interviews suggest that the mere 'threat' of Small Claims Court has encouraged parties to settle.²³⁸ For example, Phil Marriot²³⁹ of Consumer Affairs noted:

Some of the 'bad' traders have now lost quite a few cases. Thus the mere "threat" of Small Claims is now working to make these types of traders more amenable. In fact, standard letters now often indicate Small Claims as part of the natural chain of progression in this type of case. However, it should be stressed that resolving, working out the problem, by means of settlement is the preferred option.. Many traders now bring Small Claims actions themselves because they consider it a reasonable and fair system.

Further evidence of this symbiotic relationship between Small Claims Court and other dispute resolution mechanisms comes from the survey of disputants whose cases settled. Although the numbers involved were small and the return rate was low, the responses showed that more than half stated that they would probably not or definitely not have come to a settlement of their claim had it not been filed in Small Claims Court.

The Small Claims Court should, in light of the above evidence, regularly consult with other dispute resolution bodies to ensure that the relationship is a harmonious one. Indeed, perhaps some consideration may even be given the establishment of other structures to enhance settlement possibilities. For example, in the State of Michigan in the USA, the Small Claims Court has

²³⁷ *Ibid.*

²³⁸ *Ibid.*

²³⁹ *Ibid.*

successfully utilised voluntary attorneys who meet with litigants in the evening to attempt a settlement of the dispute. Evaluation of the program reveals that lawyers liked the involvement, crowded Small Claims dockets were cleared, 17% of the cases in which a lawyer was involved in aiding the parties to reach a settlement resulted in dismissals and over one third of the cases settled.²⁴⁰

6.6.15 Summary

One third of all cases filed in Small Claims are dismissed prior to the hearing stage. The major reason for dismissal is that the parties settled their dispute.

Approximately a quarter of claims are heard ex parte. Overwhelmingly it is the respondent who fails to appear.

Even though a party fails to appear the claimant must nevertheless prove a claim subject to the Magistrate's satisfaction.

The low number of rehearings suggests that disputants are not abusing the right to a rehearing provisions under the Tasmanian legislation.

Registrar's Conferences to encourage settlement and ensure that parties are prepared for their hearing have only recently begun in Tasmania. Their performance will require a future evaluation.

There is an increased use of settlement, especially via Registrar's conferences. These conferences not only sometimes result in settlement, but also help to ensure that the parties are better prepared for the hearing. Magistrates, Court staff and supporting groups are enthusiastic about such conferences, but realise that their success will have to be monitored and evaluated.

Magistrates acknowledged the problem of possible coercion of inexperienced litigants to settle a case which arguably should not have been settled. For this reason, judicial supervision of mediation and settlement efforts is important.

²⁴⁰ G. Cifelli and D. Szymanski, 'Mediating Small Claims Promotes Amicable Settlements' (Fall 1983) *State Court Journal* 18.

Approximately one-third of disputants who attended the hearing (28% claimants; 33% respondents) stated they wanted to come to an agreement with the other party at the hearing. However, approximately two thirds of the claimants (67%) and just over half the respondents (58%) came to the hearing wanting the Magistrate to make a decision. This suggests the need for more public education regarding the settlement role of Small Claims. It also points to the need for some other structure to engage parties in settlement negotiations at the earliest possible opportunity. Consideration should be given to a program in which lawyers volunteer to assist parties in reaching an agreement.

Comparing those cases in which the disputants stated they reached an agreement with those in which the disputants stated that the Magistrate made decision, there was a statistical difference in whether the disputants would use the Small Claims Court again. In all of the cases where the result was by agreement, the disputant stated that they would use the system again. This contrast with only 70% of cases where the Magistrate imposed a decision. There was no significant difference between the groups in respect of the opportunity to present a case and whether the decision was perceived to be fair, whether the party compromised more than intended or more than was judged fair. Parties thus appear to be more satisfied if their Small Claims experience results in the parties having reached an agreement as opposed to the Magistrate having imposed a decision.

A majority of the disputants stated they had made up their mind before the hearing as to how much they were prepared to compromise (58% claimants; 60% respondents). A significant number of these ((32% claimants; 46% respondents) stated they actually compromised more than they had intended. Disputants were fairly evenly divided as to whether they compromised more than was fair, with respondents slightly more likely than claimants to consider that they compromised more than was fair.

A strong majority of claimants (70%) and a majority of respondents (55%) thought the Magistrate was very good or quite good at getting the disputants to agree to a settlement.

The relationship between the Small Claims Court and other dispute resolution bodies is a symbiotic one. This suggests the need to maintain a close working relationship between Small Claims and such groups as the Hobart Community Legal Service, Legal Aid and Consumer Affairs.

Whether mediation and other alternatives to an adversarial hearing represent a curse or blessing is open to considerable dispute. One need only contrast, for example the views of former US Chief Justice Warren Burger,²⁴¹ (who predicted that ADR's would free individuals from destructive conflict) with the views of writers like Richard Abel²⁴² (who contend these same ADR's threaten social freedoms).

Notwithstanding the theoretical debate, a number of conclusions seem to follow from the Tasmanian Small Claims experience as described above. Firstly, it is clear that a great deal of community education is necessary, as evidenced by the fact that most disputants, when asked what they wanted to happen, indicated they wanted the Magistrate to make a decision rather than to work out an agreement with the other party. This education should inform the public about the Court's primary role in helping the parties reach an agreement. Furthermore, disputants, having found their way to Small Claims Court, need to understand how the Court goes about the task of bringing about that agreement. For example, the writer observed a few cases in which the parties in discussing the case during the 'settlement' phase obviously thought they were participating in the hearing and were surprised when they had to tell their stories a second time, but under oath.

Secondly, the above results, especially the finding that a significant number of disputants felt that they had compromised more than was fair, underscores the need for greater sensitivity on the part of the Court about the possible existence of coercive factors. There is also the need for Magistrates to monitor settlement agreements concluded outside the Magistrate's presence²⁴³ in order to avoid possible coercive elements and ensure that settlements are the result of genuine agreement rather than undue influence or pressure.²⁴⁴

²⁴¹ W. E. Burger, 'Our Vicious Legal Spiral' (Fall 1977) 16 *Judges Journal* 22-24, 48-49.

²⁴² R. Abel, 'The Contradictions of Informal Justice' in R. Abel (ed) *the Politics of Informal Justice Volume I: The American Experience* (1982) (New York, Academic Press) 267-320.

²⁴³ This was also recommended by Ruhnka and Weller *op. cit.* 153.

²⁴⁴ See R. Abel, 'The Contradictions of Informal Justice' in R. Abel (ed) *the Politics of Informal Justice Volume I: The American Experience* (1982) (New York, Academic Press) 267-320. Cf D.. Carlson, 'Ethical Responsibilities of a Mediator: The Case for Intensive Mediation' Prize Paper, Harvard Law School, 1984, cited in Borrelli, *op. cit.* 291. (Carlson argues that even quite intensive mediation will provide the parties. greater voluntariness than adjudication).

Thirdly, it is also evident that the Court needs to develop a coherent and structured mediation program which is coordinated with other agencies and which is staffed by personnel trained²⁴⁵ in alternative dispute resolution procedures.

Finally, one must acknowledge the need for a great deal more research into the settlement process. For example, insufficient attention has been paid to problems of communication and understanding, especially in regard to concepts of fairness.²⁴⁶ There also remains the issue of whether any alternative dispute resolution mechanisms should be compulsory and how best to structure the settlement procedure so that coercion is minimised and the independence of the judiciary maintained should the case progress to the formal hearing stage. Finally, there is the larger issue of whether institutionalised mediation can,²⁴⁷ or even should, delve into many matters which traditionally have been left to informal dispute resolution mechanisms.²⁴⁸ Thus, perhaps the Small Claims Court should increasingly look to other non-court bodies to handle its mediation/conciliation role.

245 Compare for example the types of mediation training recently implemented by the AAT and Social Security Departments.

246 Cardoso de Oliverira, *op. cit.*. Oliverira found that an important distinction exists between 'equitable agreements' and 'bargained for compromises'. While equitable agreements 'reveal the litigants' concerns with issues of fairness and a high degree of responsiveness to their demands towards issues of rightness, the bargained compromises are characterized by an emphasis on a more strategic orientation where the main concern of the parties, is getting as much as possible under the circumstances, or the most reasonable settlement from that perspective.' (abstract). See generally, J. Habermas, *Moral Consciousness and Communicative Action* (1990) (Cambridge, Massachusetts, MIT Press).

247 Some writers for example have found that mediation does not adequately delve into the nature of the relationship between the parties. See W. L. Felstiner and L. A. Williams, 'Community Mediation in Dorchester, Massachusetts,' in R. Tomasic and M. M. Feeley, (ed), *Neighbourhood Justice, Assessment of an Emerging Idea* (New York, Longman) 147-148.

248 Abel and others also note the problem caused by the intrusion of the state into formerly private dispute. See R. Abel, 'The Contradictions of Informal Justice' in R. Abel (ed) *the Politics of Informal Justice Volume I: The American Experience* (1982) (New York, Academic Press) 267-320. Thus Christie argues the participants lose control of their own conflicts which are 'taken away, given away, melt away or are made invisible'. Professionalising disputes in the Small Claims Court thus arguably undermines the confidence of those people to handle their own conflict. While this is a danger it is beyond the scope of this study to investigate in detail problems caused by the removal of dispute resolution from the community in which these differences occur. See e.g., N. Christie, 'Conflict as Property' (1977) 17(1) *British Journal of Criminology* 1, 7.

6.7 The Hearing

6.7.1 Role of the Magistrate

Introduction

The role of the Magistrate in regard to settlement was considered in the previous section. This section moves chronologically to consider the role of the Magistrate in the conduct of the Small Claims hearing.

In General

Commentators on Small Claims issues have universally recognised the pivotal role played by the Magistrate/Referee in the success of Small Claims Courts and Tribunals.²⁴⁹ In large part, this importance stems from the more inquisitorial and active role played by the decider and the presence of litigants conducting their own cases without the assistance of legal counsel. It must also be recognised that for most disputants, the largest single block of time and most intense experience which they undergo in relation to the Small Claims Court concerns the hearing; and the tone, atmosphere and conduct of the hearing is significantly affected by the skills and approach of the Magistrate. Moreover, as mentioned earlier, it is sobering to realise that for most citizens, their experience of, and attitudes toward, the legal system as a whole will be significantly shaped by their experience in Small Claims because they are more likely to come into contact with it than any other civil court.²⁵⁰ Perhaps this is a point to be borne in mind by governments when considering resources for Small Claims Courts.

Role Conflict

The position of Small Claims Magistrate is crucial to the Court's success, but it is also an extremely difficult role and one rife with role conflict. The Magistrate must be administrator, fact finder, conciliator, neutral umpire, educator, and defender of the weak disputant against the strong, etc. Moreover, these roles

²⁴⁹ See eg Ruhnka and Weller *op. cit.* 37 ('a good Small Claims Court requires good judges'); Note, Small Claims Courts: Reform Revisited (1969) 5 *Colum. J.L. & Soc. Probs* 47, at 55 (the quality of the judge is a 'crucial determinant').

²⁵⁰ For example, in the financial year 1990-91, The Court of Requests in Hobart heard 346 cases while the Small Claims Court in Hobart heard 953 in the same period. Moreover, lawyers would have been primarily involved in the Courts of Requests while disputants would have been representing themselves in Small Claims Court (Figures from Mr Paul Huxtable, Deputy Registrar). Accordingly, the quantity and intensity of citizen contact with the Courts is much greater in Small Claims.

must often be carried out all at once, without the assistance of lawyers, and in extremely pressured circumstances.²⁵¹ For example, former Magistrate, Mr Chen²⁵² commented on the difficulty of dealing with *pro se* litigants:

I don't know why, I suppose it is because the absence of counsel makes a big difference. There is an understanding between the counsel and the Bench in all courts, certain behaviour procedures are adopted and cause any litigation to run fairly smoothly. But where you are dealing with two people who are completely strange to any sort of procedure, it is quite difficult to keep them on line to get them in the right direction because they tend to fly off on a tangent half the time, particularly when we are talking about matters that are quite clearly hearsay, opinion. They don't understand that they can't say that.

Mr Hill²⁵³ commented on the conflict between the need to push a large number of cases through the system and to attempt settlement and the pressure that can be exerted on disputants to settle when ideally they should not.

Handling Complex Cases

In addition to playing many parts, the Magistrate must also deal with some extremely difficult cases and parties. Small claims, as noted in Chapter 4, are not necessarily simple claims. This point was also borne out by interviews with Magistrates. For example, Mr Hemming²⁵⁴ noted that building disputes often involved extremely complicated factual situations. Indeed, the researcher can recall observing Mr Hemming's desk and floor covered with architect's drawings, plans, specifications, photographs and other material in one such dispute which was nevertheless a 'small claim'. Similarly, Mr Hemming

251 L. L. Fuller, 'The Forms and Limits of Adjudication', (1978) 92 *Harvard Law Review* 353, 382-383.

252 Personal Communication with Mr R. Chen, former Magistrate in Burnie, 17 August 1990, Summary of Interviews, *op. cit.* s 3.

253 Summary of Interviews, *op. cit.*

254 Interview with Magistrate Andrew Hemming, 7 November 1991, Summary of Interviews, *op. cit.* s 3.

pointed out that contractual disputes, especially where there is no written agreement, can be very difficult to determine. Other Small Claims disputes are complicated because of the personality or relationship of the parties. For example, landlords and tenants, as well as family members can often bring to the Court a history of animosity and ill will which carries over into their Small Claims Court hearing.²⁵⁵

Magistrate Burn-out

Despite the challenging and stressful nature of the task, the full time Magistrate for Small Claims appears to be handling it well. This conclusion is supported not only by interviews and court observations, but also by the comments and satisfaction ratings of disputants which will be discussed below. Taking a long-term view, however, one must worry about the problem of 'burn-out' as a result of the difficult and intense nature of being a Magistrate in Small Claims. All Magistrates interviewed acknowledged this as a potential problem. For example, the previous and first Small Claims Magistrate (then Special Commissioner), Mr Michael Hill²⁵⁶ reflected:

I found the job, quite frankly, the most exhausting experience I have had - that's counting criminal appeals or any jurisdiction I have been involved with. At the end of the day in Small Claims I was absolutely exhausted.

Full-time vs Part-time Magistrates

Mr Hemming is the State's sole full-time Small Claims Magistrate and handles most of the general cases. Part-time Magistrates, usually from the Court of Requests,²⁵⁷ help out with motor vehicle cases, which now constitute almost half of the cases filed in Small Claims. Both interviews and personal observations revealed, in some cases, a striking contrast in the conduct of the trials between the full time Small Claims Magistrate and part-time

²⁵⁵ *Ibid.*

²⁵⁶ Interview with Magistrate Hill, see Summary of Interviews, *op. cit.* s 3.

²⁵⁷ Court of Requests Magistrates no longer reside over Small Claims cases in Hobart, though they did so during the period of the study.

Magistrates.²⁵⁸ Many part-time Magistrates were uncomfortable with and sometimes even appeared unsympathetic to the aims of Small Claims. The usual way in which many of these part-time Magistrates resolved this tension was to adhere to the letter of the Small Claims statute, if not its spirit. Trials presided over by these Magistrates were often much more formal and less inquisitorial in style. One Magistrate also routinely brought in his clerk, who, seated between the bench and the parties, recorded the proceedings. All of this added considerably to the formality and 'adversarial' appearance of the process. Finally, despite the fact that the legislation requires that the primary function of the Small Claims Magistrate is to bring the parties to an agreeable settlement,²⁵⁹ some part-time Magistrates made little attempt to test the possibilities of settlement before launching into a formal hearing. This contrasts markedly with observations of the full-time Magistrate who actively explored settlement possibilities prior to the commencement of a hearing.

On the other hand, and in fairness to the part-time Magistrates, it seems unrealistic to expect Court of Requests Magistrates, without any special training in regard to small claims and accustomed to handling cases where both parties are assisted by lawyers in a much more formal court atmosphere to assume chameleon like qualities and switch from an adversarial to an inquisitorial method of dispute resolution.²⁶⁰ Rather it is preferable either to have another full-time Magistrate specifically trained for Small Claims or at least to ensure that part-time Small Claims Magistrates are both trained in Small Claims procedures and empathetic to its goals. One way to provide some continuity between different Magistrates might be the development of 'Bench Books' to assist in the education and training, especially of part-time Small Claims Magistrates.²⁶¹ Such books could provide a description of good practice, useful readings, detailed case studies etc. Indeed, several part-time Magistrates, never having seen another Magistrate in action, were most interested to hear about the judicial techniques utilised by Mr Hemming, the

258 Ingleby found a similar variety of styles in his study of Small Claims Tribunals, Family Court Mediation and Order 24 Conferences in the Family Court. See Ingleby (1991), *op. cit.* Chapter 9, at 83-90.

259 *Magistrate Court (Small Claims Division) Act 1989 (Tas)*, s. 8(1).

260 Contrast Victoria where referees must have training before they hear any disputes. Further, conferences are held every 6 weeks to ensure problems are discussed and their is consistency in operation. See Levine, *op. cit.* 142.

261 Weller and Ruhnka, *op. cit.* 195-196.

full-time Small Claims Magistrate. This underscores the need for greater communication amongst Magistrates in Tasmania, as well as the need for Tasmania's Magistrates to go periodically to the mainland to share their experiences, insights and problems with colleagues in other jurisdictions.

6.7.2 The Disputants: Preparation for the Hearing

One criticism of Small Claims procedures which excluded lawyers was that parties would not be able to adequately present their case. Accordingly, the disputants who attended the hearing were asked :

Looking back, how well prepared were you for the hearing?

This question was intended to find out how well prepared the disputants felt they were subsequent to the hearing, rather than prior to the hearing. Claimants considered themselves significantly better prepared for the hearing than did respondents (Table 39). Almost half the claimants stated they were 'very well prepared' and a total of almost 85% rated themselves as 'well prepared'. In contrast, only about 71% of the respondents rated themselves as 'well prepared'.²⁶² This supports a point made earlier in regard to Court assistance that greater attention must be given to the preparation needs of respondents,

Table 39: Degree of Preparedness for the Hearing

Response	CLAIMANTS		RESPONDENTS	
	Freq	%	Freq	%
Very well prepared	103	46.6%	43	32.6%
Quite well prepared	86	38.9%	50	37.9%
Not very well prepared	17	7.7%	28	21.2%
Not at all well repaired	6	2.7%	11	8.3%
No response	10	4.5%	13	9%

The high quality of preparation on the part of disputants is also generally supported by the majority of Magistrates, court staff and supporting groups, as well as the researcher's observations.²⁶³ The comment of Mr Hill²⁶⁴ was representative:

²⁶² NZ Study, at 15-16 (figures almost the same 89% of claimants; 75% of respondents stated they were well prepared).

²⁶³ See generally, *Summary of Interviews op. cit.*

I think the vast majority are extremely well prepared. I was surprised by the standard of presentation. When I used to go around to various groups speaking the gospel about Small Claims I always pointed that out. When I think about it is not that surprising, because in the Court of Requests you seldom get to hear exactly what the parties want to say because their lawyer does the talking or instructs them so what they do say is tailored to what their solicitor's tell them they can say. I had have to say I was very comfortable with the standard of presentation. They had drawings, photographs, etc.

Former Magistrate Chen,²⁶⁵ in contrast, was of the opinion that most disputants in Small Claims are poorly prepared, and tended not to realise, for example, the importance of witnesses. Mr Rickwood,²⁶⁶ a Registrar, felt that one exception to the general high level of disputant preparation view was in the case of building claims:

We found often, particularly with what we might call building claims, people just don't come along prepared and frequently have to have their hearing adjourned so that they can get the documents they need.

Mr Hemming²⁶⁷ made the further point that while most disputants aptly explain their side of the case, few are effective at cross-examination. However, even here, with a little assistance from the Magistrate, most disputants do an adequate job.

264 *Ibid.*

265 Personal Communication, 17 August 1990, Summary of Interviews, *op. cit.* s 3.

266 Personal Communication, 15 March, 1990, Summary of Interviews, *op. cit.* s 4.

267 Personal Communication, *op. cit.*

6.7.3 Involvement of Lawyers in Small Claims

Going to a Lawyer for Advice

As noted earlier, though a major goal of Small Claims is to reduce the need for legal assistance, a high percentage of disputants go to a lawyer for advice. In part, this is because lawyers are the principal source referring parties to Small Claims and educating the community about its availability. From my experience with my own case, I would also suggest that the task of going to Court and representing one's self is quite daunting. As Table 40 shows, approximately one third of disputants went to a lawyer for advice.²⁶⁸

Table 40: Did Disputant Go to a Lawyer for Advice?

	CLAIMANTS		RESPONDENTS	
Response	Freq	%	Freq	%
yes	67	31.6%	54	37.2%
no	145	68.4%	87	56.6%

Notes

1. No response/information: 10 (Claim); 9 (Resp)

Helpfulness of Advice from Lawyers

Those disputants who went to a lawyer for advice about Small Claims were asked whether they considered it to their advantage to have gone to a lawyer . A strong majority of both claimants and respondents concluded that it was to their advantage to have gone to a lawyer (Table 41).

²⁶⁸ NZ Study, at 16-17 (25% of claimants and 21% of respondents went to a lawyer for advice); deVaus, at 89, (23% of claimants approached solicitors about their dispute before they went to the Tribunal and the larger the amount involved the more likely they were to seek legal advice); Iowa Small Claims, 471-72 (found 41% of disputants received some sort of legal assistance).

Table 41: Whether it was to Disputant's Advantage to have gone to a Lawyer

	CLAIMANTS		RESPONDENTS	
Response	Freq	%	Freq	%
Yes	51	65.4%	33	58.9%
No	27	34.6%	23	41.1%

Notes

1. base: those who said they went to lawyer for advice and stated it was to their advantage
2. a number who were unresponsive to the previous question nevertheless answered this one.

Those disputants who did not go to a lawyer were asked whether, in hindsight, they now think it would have been helpful at their Small Claims hearing if they had gone to a lawyer for advice.²⁶⁹

Table 42: Perceptions as to Whether it would have been Helpful to have Gone to a Lawyer

	CLAIMANTS		RESPONDENTS	
Response	Freq	%	Freq	%
Yes	19	13.8%	20	23.5%
No	117	84.8%	65	76.5%
Don't know	2	1.4%		

Notes

1. base: claimants and respondents who stated they had not gone to a lawyer for advice

Respondents were more likely than claimants to state that, in hindsight, it would have been helpful to have gone to a lawyer.²⁷⁰ Interestingly, though most who went to a lawyer thought it to be to their advantage, most disputants in fact would not go.

²⁶⁹ NZ Study, at 17 (a higher percentage thought the lawyer was to their advantage, 75% of claimants; 71% of respondents).

²⁷⁰ NZ study, at 18 (13% of claimants and 26% of respondents stated it would have been helpful to go to a lawyer).

Even in jurisdictions in which legal representation is permitted, it is questionable²⁷¹ whether people with lawyers do better in Small Claims Court. The empirical evidence to date is inconclusive.²⁷² Though discussed in more detail in section 12, the Tasmanian experience was that there was no relation between the disputants' perceived level of preparedness and whether or not disputants consulted a lawyer before hand; nor did those not consulting a lawyers before hand recover any lesser percentage of the amount claimed. Furthermore, compared to those who saw a lawyer before hand, those disputants who did not consult a lawyer were more likely to state that the decision was fair, that they had an opportunity to present their case, and that they would use the system again. This suggest that a majority of disputants feel competent enough to handle their own case and perceive the benefits of Small Claims Court to outweigh any detriment caused by the absence of legal representation.

Should there be Representation by Lawyers at Small Claims Hearings?

The rationale behind baring lawyers, except in exceptional circumstances,²⁷³ is fourfold. First, the legal costs for pursuing or defending a claim below \$2000 would quickly exceed the value of the claim, thus discouraging most people from using the Court at all. Secondly, parties are able to pursue their claim on an equal footing and poorer litigants are not at a disadvantage vis-a-vis another party with greater resources. Thirdly, the absence of lawyers ensures that the

271 See M. Galanter, 'Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change,' (Fall 1974) 9 *Law and Society Review* 114-119.

272 See e.g., Small Claims Court Study Group, National Institute for Consumer Justice, *Little Injustices: Small Claims Courts and the American Consumer* (1972) at 105. (A 1971 survey of Small Claims Courts in New York City concluded that the attorneys did not seem to affect the relative size of the Court award. In cases that did not involve attorneys the award averaged 50% of the plaintiff's claim; in cases with a lawyer for the plaintiff, the award was 49 percent of the claim; cases with an attorney for the defendant received an award that was 41% of the claim. However, a 1970 study of the Cambridge, Massachusetts Small Claims Court found that while unrepresented plaintiffs won 655 of their cases, represented plaintiffs prevailed 72 percent of the time. Information on the relationship between claims and awards was not provided in this second study; but the close parallels to the 1982-86 case statistics). As Borrelli points out, 'Unfortunately none of these studies can assess the relative strength of the attorney's cases--perhaps in New York, lawyers were hired by those with very weak cases and the success rates represent a considerable achievement for counsel. Alternatively, Cambridge litigants could have strong cases which their attorneys are bringing to strong conclusions. Borrelli, *op. cit.* 290.

273 *Magistrates Court (Small Claims Division) Act 1989* (Tas), s 22(3). Lawyers will be allowed if the parties agree and the Magistrate determines it is desirable.

dispute will be resolved quickly²⁷⁴ and with a minimum of formality.²⁷⁵ Finally, there is the belief that litigants in control of their own case, and able to tell their own story, will more likely be satisfied with the outcome.²⁷⁶

Disputants were asked at a later stage of the questionnaire whether or not lawyers should be able to represent disputants as Small Claims hearings (Table 43). A strong majority of both claimants and respondents felt lawyers should not be able to represent disputants.²⁷⁷ This suggests that most disputants see the presence of lawyers as inconsistent with the aims of the Small Claims Court to provide access to quick and informal justice for minor civil matters.

274 See J. Folino, *The Small Claims Tribunal* (1978) Melbourne, Leo Cussen Institute for Continuing Legal Education, at 19.

275 See deVaus, *op. cit.* 88.

276 See generally J. Conley and W. Barr, *Rules Versus Relationships* (1990) (Chicago, University of Chicago Press).

277 NZ Study at 19, (NZ Litigants were even stronger in their opinion that lawyers should not be able to represent disputants at Small Claims hearings. Approximately half of the disputants stated that lawyers should 'definitely' not represent disputants at hearings only 21% of claimants and 26% of respondents stated that lawyers should be able to represent disputants in Small Claims); Iowa Study, at 472, 502 (In a jurisdiction where lawyers are allowed, 43% of defendants and 34% of plaintiffs said small claims were too complex to understand without representation by an attorney. At the same time, a survey of judges found that 41% of the Small Claims judges felt attorneys needlessly complicate the Small Claims process and 34% stated they felt attorneys make Small Claims unnecessarily formal; and 64% stated that lawyers do not speed up Small Claims); deVaus, at 89-90 (In Victoria, lawyers can represent disputants if both parties agree, but only 6 out of over 1600 reported receiving help in the hearing. A large majority (74%) of claimants felt that restrictions [on legal representation] were a good idea: only 14% thought it was a bad idea'; also the attitude was the same when controlling for demographic variables and size of the claim. The only variables which were linked to feelings about lawyer restrictions were outcome of the case and whether the party felt they had the opportunity to put their side of the case. Disputants who did not feel that they had the chance to put their case (most also lost) and a negative outcome were more likely to want legal representation in Small Claims. DeVaus concluded

This was consistent with the general pattern that those who lost their case were more critical of most things about the SCT. . . However three things should be noted. First, the losers were less negative about the restrictions on solicitors than there were about many other things. Second, the majority (55%) of losers still supported the ban: only 28% opposed it. Third, very few felt disadvantaged by the ban or felt that it affected their opportunity to put their case properly (at 92).

Table 43: Whether Lawyers Should be Able to Represent Disputants at Hearings

Response	CLAIMANTS		RESPONDENTS	
	Freq	%	Freq	%
Definitely yes	25	12.5%	25	18.7%
Probably yes	45	22.5%	30	22.4%
Probably no	50	25.0%	29	21.6%
Definitely no	79	39.5%	50	37.3%
Don't know	1	0.5%		

Notes

1. Base: claimants and respondents who attended hearing
2. No response: 22 claimants; 11 respondents

Magistrates also were in favour of the existing bar against the use of lawyers.²⁷⁸ They preferred the Tasmanian system in which lawyers are generally excluded from the court, except in certain circumstances. For example, Mr Hill²⁷⁹ cited a complex nuisance action, another one involving restraint of trade in which it was useful to have lawyers involved. Mr Hemming²⁸⁰ noted a building dispute involving a lawyer who was suing a builder over the construction of a flat for the lawyer. The complexity of the dispute plus the obvious disadvantage of the legally untrained builder led Mr Hemming to allow representation by lawyers. He indicated that very few disputants had petitioned the court to allow legal representation. Where this has occurred the Magistrate allows both the disputant and their lawyer or other representative to be heard on that issue.

²⁷⁸ Ruhnka and Weller, *op. cit.*, found that in those jurisdictions which excluded lawyers from participation in Small Claims, the judges were in favour of the ban: ('Judges in the Courts prohibiting attorneys at trial were almost unanimous in saying they would not want attorneys at Small Claims trials. Their general view was that attorneys would not add enough of value to the process of arriving at a just decision to justify the additional time the trial would take and the added expense of attorneys to the litigant or litigants. A judge in the Omaha Court summed up this position by stating, "Small claims cases run better without lawyers, because the judge can get to the crux of the dispute more quickly." In addition, many judges felt laymen could understand the trial process more easily if lawyers were not present, since lawyers often used legal magic words . . . 'objecting, demurring, claiming hearsay, and so forth--which tended (either intentionally or inadvertently) to confuse nonlawyer clients.' at 24-25.

²⁷⁹ Personal Communication, 7 February, 1990, See Summary of Interviews, *op. cit.* s. 3.

²⁸⁰ Personal Communication, 25 October 1989, Summary of Interviews, *op. cit.* s 3.

The issue of legal representation is also related to that of adequate assistance to the parties. In Small Claims Courts and Tribunals, in which lawyers are not permitted to be present, it is crucial that both claimants and respondents²⁸¹ receive adequate assistance from court staff, through booklets²⁸² and from other available literature.²⁸³ The failure of many courts and tribunals to adequately protect the interests of unrepresented parties, especially defendants, has led several commentators²⁸⁴ to advocate the use of lawyers in Small Claims, but only under the careful supervision of the court lest the atmosphere become overly legalistic. These commentators also conclude, however, that even if were permitted, the Court should continue to make every effort to make legal representation unnecessary.²⁸⁵

Finally, one must consider the impact of lawyers on Small Claims costs both to the parties and the court system. With the average amount claimed being only \$800, it is not difficult to predict that in most cases the amount charged for legal fees would amount to a substantial percentage of the amount recovered by the claimant or paid out by the respondent. Similarly, Weller and Ruhnka found that in those jurisdictions which allowed lawyers to participate in the hearing, the legal fees amounted to a substantial proportion of the amount claimed.²⁸⁶

281 S. Weller and J. Ruhnka, 'Small Claims Courts: Operations and Prospects, (Winter 1978) *State Court Journal* 5, Research Essay Series Number E006 (Williamsburg, Va, National Center For State Courts).

282 Ruhnka and Weller, *op. cit.* 7, found that 10 of the 15 Courts studied had such booklets which ranged from a one page sheet giving a brief outline of Court procedure to a small booklet. However, the information was biased toward the plaintiffs, was often only distributed only upon request, and contained nothing which would help parties determine whether they had a case worth filing or what evidence should be brought to trial. For a more recent attempt at providing information about Small Claims, see, M. Coleman, *A Handbook for Using the Small Claims Court* (1990) (Sacramento, CA, Department of Consumer Affairs); R. E. Warner, *Everybody's Guide to Small Claims Court* (1986) (Berkley, Nolo Press).

283 *Ibid*

284 Ruhnka and Weller, *op. cit.* 192-193; Small Claims Court Study Group, National Institute for Consumer Justice, *Little Injustices: Small Claims Courts and the American Consumer* (1972) 63-65 (volunteer privately funded paralegal Small Claims adviser should be attached to Court to assist in preparation, screening, referral and public relations); Massachusetts Public Interest Research Group, Inc' 'The Plight of the People's Court: An Analysis of Massachusetts Small Claims Courts' (1982) Unpublished paper at 34 (Court supported paraprofessionals should be available to assist litigants and engage in community outreach).

285 *Ibid* 6.

286 *Ibid* 9.

Indeed in those cases where the party lost wages and paid lawyers fees, the costs averaged nearly 50% of the amount claimed.²⁸⁷ One must also consider the costs to the Court system. Ingleby argues that the formulation is complex, because one must balance the time and financial costs of legal representation against the fact that the use of lawyers means that the judge will be free from the necessity of having to educate disputants about the process and less concerned that parties are aware of their legal rights.²⁸⁸

Finally, the issue of lawyer representation in Small Claims also illustrates the difficulty of obtaining the proper balance between formal and informal procedures. As Cappelletti observes, 'A conception of procedure as a merely private affair of the parties-- or, possibly worse--their advocates--can be, and indeed frequently is, in conflict with the guarantee of a real, not merely a formal, equality of the parties.'²⁸⁹

6.7.4 Insurance Representatives

Some Perceived Problems

Some of the Magistrates expressed concern about the abuse of the system by some insurance companies. This abuse took several forms: First, there was the problem created by the situation in which one party is represented by an insurance company but the other has no representation. Typical of the responses was this from Magistrate Hill who acknowledge that this type of imbalance was a frequent occurrence:²⁹⁰

That was a situation I tried to address by giving the other party help. I would say to the other party that the insured party is allowed to have their representative, I'll give you the opportunity to have someone represent you or to adjourn the

²⁸⁷ *Ibid.*

²⁸⁸ Ingleby (1991), *op. cit.* 32.

²⁸⁹ M. Cappelletti, *The Judicial Process in Comparative Perspective* (1989) (Oxford, Clarendon Press) at 252.

²⁹⁰ Interview with Magistrate Hill, Summary of Interviews, *op. cit.* s 3.

matter to see your solicitor. Usually they would say, that's ok, I'll be all right. I also explained that the insurance agent's role was not necessarily to cross-examine, but to sit there and produce evidence of the accident scene, etc and to assist the court. I know that's a little different; that if you let them in as a party, you should let them in completely, but I tried to make it so that the unrepresented party wasn't put to a disadvantage. I didn't perceive any disadvantage. If they were a little rattled by it they could adjourn and come back with someone else to help them. And if they were disadvantaged you could tell, you could feel it. Also if the insurance agent or one party was being too aggressive I would get them to back off.

A second, but related, problem is that some insurance representatives appear regularly in Small Claims, thus developing some expertise and becoming 'educated' in its operation. The danger then exists that the unrepresented party will be significantly disadvantaged when up against a party represented by an experienced insurance agent. Again, Mr Hill:²⁹¹

Question: Did you get many insurance people who sat in on 10-20 cases and therefore developed some expertise in Small Claims?

Answer: I was able to communicate on an informal basis that I didn't want to see a company send the same person all the time so that they could say they were an expert about it. They cooperated with that and I must say that most agents were a help rather than a hindrance.

In contrast, Mr Hemming²⁹² thought the insurance representatives did not present a problem and at worst were 'well meaning amateurs'.

291 *Ibid.*

292 Interview with Mr Hemming, Summary of Interviews, *op. cit.* s 3.

A third problem is that in some cases the insured is clearly liable, yet the insurance company, through its insured, disputes the insurance claim in Small Claims Court. One Magistrate noted that in this situation he often asks the party why they are there, when the liability is clear. The usual response is that the insurance company told them to be.

A fourth problem perceived by some Magistrates is that the large numbers of cases, filed en masse, threaten to drive other litigants, for example, individual consumers, out of the system. Other Magistrates,²⁹³ however, noted that the legislation states that insurance companies are permitted to use the court, thus they are simply exercising their rights under the legislation.

A final problem in regard to insurance companies is the legal question of their legal status. Interestingly, at the time of this study,²⁹⁴ Magistrates held differing views concerning the legal status of insurance companies before the Small Claims Court. This was explained by Mr Hemming:²⁹⁵

Some Magistrates won't let them [insurance representatives] in full stop. Others will let them in to the extent they will let them sit, sit quiet. I take the view that whatever evidence they can give me, I will permit them to do so; even to the extent of participating in cross-examination because I've always joined them as interested parties.

Some areas need to be clarified as to whether they [insurance companies] are or are not an interested party. There is some doubt as far as some Magistrates are concerned. I must say I have never had any doubts about it. Clearly the definition of an interested party under the Act is someone who

293 See e.g., Interview with Mr Hemming, *ibid*.

294 With part-time Magistrates no longer being utilised in Small Claims in Hobart, this is apparently no longer a problem.

295 Personal Communication with Mr Hemming, 25 October, 1989, Summary of Interviews, *op. cit.* s 3.

has an interest in the settlement of the dispute and if an insurance company doesn't have that sort of interest, then who does?

Most of the Magistrates similarly acknowledged advantages of insurance company representation for the disputant who was represented. Insurance representatives provided a useful service to the court by informing clients about Small Claims procedures, ensuring that all the material facts were before the court, assisting litigants in the presentation of their case, and so on.²⁹⁶

As to the abuses of the Small Claims System by insurance companies, Mr Reg Marron²⁹⁷ of the Hobart Community Legal Service had the strongest views:

I have been aware of insurance company's training their staff to act as advocates in insurance cases, usually motor vehicle cases. This can sometimes lead to an unbalanced situation in court. I believe that this could be redressed if the Commissioner made it clear from the beginning of the hearing that the person from the insurance company was an advocate and ensured that the other party was not unfairly prejudiced (ie assisting where possible). I am aware of a case where an insured was in the right. Her insurance company indemnified her for everything except her excess. However the other party were not insured and they are suing her in Small Claims. The insurance company is letting the action go through, telling her that if you lose we'll indemnify you. Where the insurance company normally enjoys subrogated rights, here they are abrogating their rights saying "we step back from the agreement and we are telling you to step into the Small Claims".

²⁹⁶ Summary of Interviews, *op. cit.* s 3.

²⁹⁷ See Summary of Interviews, *op. cit.* s 5.

Jim Cummings²⁹⁸ of Consumer Affairs noted that Insurance Council has recently appointed some type of ombudsman which may take some of the pressure off the Small Claims Court. Mr Marriot,²⁹⁹ also of Consumer Affairs: thought that insurance companies have assumed the attitude that 'if we have to pay, we pay, but for \$20 it's worth the risk of contesting it and maybe not having to pay. This is one of the failings of the system'.

Mr England,³⁰⁰ the Chief Court Administrator, felt that if there was a problem with any particular group of users of the Small Claims Court it was with insurance companies. More specifically, he indicated that some insurance companies seemed to be forcing their clients and the opposing disputant into the Small Claims. Registrars in the North and Northwest confirmed Mr England's statements and reported hearing some complaints about: 1) 'bullying' of insureds by insurance companies who force their insured through the system; and 2) the perceived unfairness toward an unrepresented disputant, who must appear against a disputant represented by an experienced insurance agent. At the same time, there was the belief that the Magistrate kept proceedings, in such circumstances from becoming too overbearing against the unrepresented disputant.

In an attempt to alleviate some of the above mentioned problems, Mr Huxtable,³⁰¹ the Registrar, noted that a meeting³⁰² has recently been held between court staff, consumer affairs and insurance representatives to discuss any problems involved with Small Claims.

Mr Hamilton,³⁰³ the Court's first and prior Registrar, did not see insurance companies as a significant problem, though he did think that Magistrates needed to resolve the question of whether an insurance company was a party in interest. He also noted:

298 Summary of Interviews, Consumer Affairs Focus Group *op. cit.* s 5.

299 *Ibid.*

300 Personal Communication, 10 October 1990, and on numerous other occasions, Summary of Interviews, *op. cit.* s. 4.

301 Personal Communication, 7 September, 1990, Summary of Interviews, *op. cit.* s 4.

302 The researcher attended and observed the discussions of that meeting, held in Hobart, in March 1991.

303 Personal Communication, 16 October, 1989, Summary of Interviews, *op. cit.* s 4.

I must add, now the insurer is well aware of that problem and all they do is inform the client that they may not be able to help conduct the insured's case. We issue the notices and there were a few queries in the initial stages, but the insurance companies have got to the point that they know that their input will depend upon the Magistrate and how he defines the Act, ie whether they are an interested party.³⁰⁴

Mr Maloney³⁰⁵ of the Justice Department would like to see more research on issues involving insurance companies. He felt there could be evidence of a case for a separate insurance tribunal to which the insurance industry contributed, which would then free Small Claims to handle other claims. He was also wondered whether a significant number of cases involved insurance companies using the system as a debt-collection type service. If this were so they should be using the default procedures available in the Court of Requests rather than 'dragging' the insureds through Small Claims. He also stressed that it was the claimant's case and that an insurance representative should not be monopolising Small Claims proceedings.

Participation by Insurance Representatives at Hearing: Views of Disputants

Insurance agents account for most of the representation occurring in Small Claims, though arguably they are not so much representing the insured as themselves as a party in interest. Disputants were asked whether their insurance company participated at the hearing.

Table 44: Whether Insurance Company Participated

	CLAIMANT S		RESPONDENTS	
Response	Freq	%	Freq	%
Yes	43	22.3%	26	19.5%
No	150	77.7%	107	80.5%

Notes

1. no response: 29 claimants; 12 respondents

304 *Ibid.*

305 Personal Communication, 22 March, 1991, Summary of Interviews, *op. cit.* s 4.

Was the Participation of the Insurance Representative an Advantage?

If the insurance company participated, disputants were further asked whether this was to their advantage (Table 45). Finally, disputants were asked to indicate why insurance representatives were an advantage or disadvantage at the hearing (Tables 46 and 47).

Table 45: Whether Participation by Insurance Representative was an Advantage

	CLAIMANTS		RESPONDENTS	
Response	Freq	%	Freq	%
Yes	34	72.3%	16	61.5%
No	13	27.7%	10	38.5%

Notes
Base: those who were represented by their insurance company

Table 46: Claimants' Reasons Insurance Company was Advantage or Disadvantage

Response	Freq	%
Moral support	12	33.3%
Insurance rep had all the details of the case	7	19.4%
helped on court procedures/legal advice	6	16.7%
It was Ins co money at risk; ins co's claim;	6	16.7%
Experience of the insurance agent: a helpful guide	5	13.9%
Ins co made no real statement; did nothing	5	13.9%
Confirmed litigant's statements	1	2.8%
Total	42	

Table 47: Why Respondents Thought it was an Advantage/Disadvantage to Have Insurance Representative Participate in Hearing

Response	Freq	%
Helped on court procedures/legal advice	8	30.8%
Ins co made no real statement; did nothing	8	30.8%
Experience of the insurance agent: a helpful guide	7	26.9%
Insurance rep had all the details of the case	2	7.7%
It was Ins co money at risk; ins co's claim;	2	7.7%
Agent not allowed to give evidence	2	7.7%
Moral support	1	3.8%
Other	1	3.8%
Ins Co gave wrong advice	1	3.8%
Total	32	

As the above tables show, most disputants considered it an advantage for their insurance company representatives to attend their Small Claims hearing. The nature of the advantage consisted largely in moral support and information regarding court procedures.

6.7.5 Representation by Friends and Others.

The Tasmanian *Magistrates Court (Small Claims) Division Act*³⁰⁶ provides that a disputant may be represented in Small Claims by an agent who is not a legal practitioner as long as the Magistrate is satisfied that the 'proposed agent has sufficient personal knowledge of the issue in dispute and is vested with sufficient authority to bind the party.'³⁰⁷ Mr Hemming³⁰⁸ noted that requests for such representation have been few with the most common being requests for moral support with the disputant asking that a spouse or other friend be allowed to assist them. In another instance a parish priest represented one of his parishioners.

6.7.6 Knowledge and Use of Witnesses

To what extent did disputants realise that they could call witnesses for their hearing and to what extent did they use them? This information could be imparted by court staff, pamphlets, and other sources. Disputants were asked whether, before the day of the hearing, they knew that they could have witnesses at the hearing. As the figures below show, while a majority of disputants stated they knew they could have witnesses, almost a quarter of claimants and a third of the respondents did not know they could have witnesses.³⁰⁹

³⁰⁶ Section 22(4).

³⁰⁷ *Ibid.*

³⁰⁸ Personal Communication as noted above, Summary of Interviews, *op. cit.* s 3.

³⁰⁹ NZ Study, at 21 (83% of claimants and 67% of respondents knew they could have a witness at the hearing).

Table 48: Whether Disputants Knew They Could Have Witnesses At the Hearing

Response	CLAIMANT		RESPONDENT	
	Freq	%	Freq	%
Yes	158	76.7%	87	66.9%
No	48	23.3%	43	33.1
Don't know	1	0.5%		

Notes:

1. Base: all disputants who had a hearing
2. No response: 15 claimants; 15 respondents

Disputants were then asked whether or not they had called a witness at the hearing. A little over a third of claimants and almost a fourth of respondents had called a witness.³¹⁰ Mr Hemming³¹¹ however estimated that witnesses were called in approximately 50% of the cases, thus suggesting that the percentages below should be interpreted with caution. Another possibility is that while witnesses are called in approximately half of the cases today, at the time of the study this was not the case.

Table 49: Whether Disputants Called a Witness at the Hearing

Response	CLAIMANTS		RESPONDENTS	
	Freq	%	Freq	%
Yes	77	37.3%	31	23.3%
No	128	62.7%	102	76.7%

Notes

1. Base: disputants who attended hearing
2. No response: 17 claimants; 12 respondents

The claimants who called witnesses were much more likely than respondents to consider that the witness was used to their advantage.³¹² Again this suggest the need for more assistance on the part of respondents.

³¹⁰ The NZ figures were similar but respondents called a witness more often than claimants (28% of claimants; 30% of respondents) NZ Study, at 23.

³¹¹ Response of Mr Hemming to the 1991 Preliminary Report on Small Claims.

³¹² In the NZ Study, at 22, the response was more even (81% of claimants and 87% of respondents felt that the witness was used to their advantage).

Table 50: Whether Witness Was Used to Advantage

	CLAIMANT S		RESPONDENTS	
Response	Freq	%	Freq	%
Yes	62	81.6%	23	60.5%
No	13	17.1%	15	39.5%
Don't know	1	1.3%		

Notes

1. Base: claimants who called witness at the hearing
2. Note that one claimant gave a yes response to q. 14a, but did not answer 14b

Table 51: Whether Disputant Knew Before the Day of the Hearing If Other Party Was Going to Bring a Witness³¹³

	CLAIMANTS		RESPONDENTS	
Response	Freq	%	Freq	%
Yes	20	9.9%	19	14.6%
No	179	88.6%	111	85.4%
Don't know	3	1.5%		

Notes

1. Base: Claimants who attended a hearing
2. No response: 20 claimants; 15 respondents

6.7.7 Privacy of Hearing

The Tasmanian Act provides that Small Claims hearings are to be held in private.³¹⁴ Such privacy emphasises the informal nature of Small Claims proceedings and reduces the pressure and exposure which disputants might otherwise experience if they knew that the hearings were public. Disputants who attended the hearing were asked to rate how private they thought the hearing was and also how important it was to them that hearings be held in private.³¹⁵ The figures (Tables 52 and 53) show that privacy is important and

³¹³ The figures for NZ are similarly low (11% of claimants and 4% of respondents knew before the day of the hearing whether the other party was going to bring a witness) NZ Study, at 22.

³¹⁴ *Magistrates Court (Small Claims) Division) Act 1989* (Tas) s 23(1). The Magistrate, however, may open the hearing to the public if the parties agree (s 23(2)).

³¹⁵ The NZ figures were even higher (97% of claimants and 92% of respondents thought the hearings were private) NZ Study, at 22.

that the level of privacy achieved generally matches the perceived importance.³¹⁶

Table 52: Degree of Privacy of Hearing

Response	CLAIMANTS		RESPONDENTS	
	Freq	%	Freq	%
Very private	123	58.9%	56	43.1%
Quite private	64	30.6%	60	46.2%
Not very private	12	5.7%	11	8.5%
Not at all private	9	4.3%	3	2.2%
Don't know	1	0.5%		

Notes

1. Base: Claimants who attended a hearing
2. No response: 13 claimants; 15 respondents

Table 53: Degree of Importance that Hearings be Held in Private

Response	CLAIMANTS		RESPONDENTS	
	Freq	%	Freq	%
Very important	95	45.1%	63	46.7%
Quite important	56	26.5%	39	28.9%
Neither important nor unimportant	42	19.9%	24	17.8%
Not very important	6	2.8%	3	2.2%
Not at all important	12	5.7%	6	4.4%

Notes

1. Base: claimants who attended the hearing
2. No response: 11 claimants; 10 respondents

6.7.8 Informality of Hearing

Formality, like sanity, is best thought of as a matter of degree as opposed to a fixed, static feature characteristic of a court or tribunal.³¹⁷ Indeed, there is a

³¹⁶ This was also true of the NZ Study, at 24.

³¹⁷ See M. Allars, 'Neutrality, the Judicial Paradigm and Tribunal Procedure' (September 1991) 13 (3) *Sydney Law Review* 377 'Tribunal procedure is usually analysed by way of comparison with the procedure of Courts, which is regarded as the most formal and the most adversarial of decision-making processes. the comparison often rests upon the assumption that the full range of these two sets of procedural features--formal, and adversarial--inevitably accompany each other' at (378)..The author argues this is an incorrect assumption See generally L L. Fuller, 'The Forms and Limits of Adjudication' (1978) 92 *Harvard Law Review* 353; D. J. Galligan, *Discretionary Powers* (1986) at 114-17. Generally, a Tribunal is thought to be more informal than a Court. See M. Levine, 'Dispute Resolution in Small Claims' in J. Mugford (ed) *Alternative Dispute Resolution* (July 1986) Seminar: Proceedings No 15, (Canberra, ACT, Australian Institute of Criminology) 137, 141 (In Victoria and NSW, both tribunals, 'The referee interrogates rather than allows presentation of evidence. The referee will often not require parties to follow the normal process of Court. If you can

delicate balance, even a tension, between accessibility, informality, and freedom from formal rules of evidence, on the one hand; and fairness, impartiality and consistency on the other.³¹⁸ A major aim of Small Claims Courts is to keep the hearings as informal as practicable given the need also to be fair and impartial in applying the law.³¹⁹ Allars³²⁰ maintains that:

informal decision-making of institutions is characterised by the following procedural features. The use of legal professionals is minimised, public accessibility is maximised by removing bars of a financial or rule-based nature to the availability of remedies or assistance. By making procedure simple and flexible, the cost and time involved in dispute resolution is dramatically reduced. To the extent that norms relating to procedure can be distinguished from norms relating to matters of substance, informality also has a substantive impact. Common sense and social norms calculated to achieve justice in the individual case are applied in preference to legal norms.

The Tasmanian Act does not define 'informal' but does provide that formal rules of evidence do not apply. On the other hand the parties are under oath, the Magistrate is required to apply the law, to comply with the dictates of

imagine for one moment, that the normal process in Court is that the complaining party gives evidence and is then subject to questioning (cross-examination) by the other party. The complaining party then produces his witnesses and leads them through their evidence which is again subject to questioning by the other party. The other party then does exactly the same with his case. In contrast, the Tribunals allow parties to deal with each separate issue in a presentation, question by referee, response by the other side, etc until that issue is clear. Accordingly, the Small Claims Tribunal follows the mediation example substantially in that it finds out the issues and helps to isolate them, then explores and helps create options for settlement and guides negotiation or the negotiation process.

- 318 H. Genn and Y. Genn, *Effectiveness of Representation at Tribunals* (July 1989) Lord Chancellor's Department.)
- 319 See A. Robbins, 'Small Claims: Can We Improve the System? Part I (1982) 24 *Legal S.B.* 280; J. Turner, 'The Victorian Small Claims Tribunal' (1975) 2 *Monash L. R.* 125.
- 320 M. Allars, 'Neutrality, the Judicial Paradigm and Tribunal Procedure'(September 1991) 13(3) *Sydney Law Review* 377, 379-380.

natural justice, etc. It must be borne in mind that the parties to a Small Claims action are, after all, in dispute. Consequently, it does not follow that complete informality is either possible or desirable. The issue therefore is whether all factors considered, the court has achieved the right balance between formality and informality. As with the question relating to privacy, disputants were asked to rate the degree of informality of the hearing and also the importance of informality.

Table 54: Degree of Informality of Hearing

	CLAIMANTS		RESPONDENTS	
Response	Freq	%	Freq	%
Very informal	22	10.7%	11	8.5%
Quite informal	98	47.3%	57	44.2%
Neither informal nor formal	43	20.8%	21	16.3%
Not very informal	27	13.0%	27	20.9%
Not at all informal	16	7.7%	13	10.1%
Don't know	20	10.5%		

Notes

1. Base: Disputants who attended hearing
2. No response: 15 claimants; 16 respondents

Table 55: Degree of Importance that Hearings be Informal

	CLAIMANTS		RESPONDENTS	
Response	Freq	%	Freq	%
Very important	58	28.2%	46	34.8%
Quite important	84	40.8%	54	40.9%
Neither important nor unimportant	49	23.8%	17	12.9%
Not very important	10	4.9%	10	7.6%
Not at all important	5	2.3%	5	3.8%

Notes

1. Base: Disputants who attended hearing
2. No response: 16; claimants; 13 respondents

Though not quite as important to them as the degree of privacy, disputants also considered it important that Small Claims hearings be informal. Generally, the degree of importance was matched by the degree of informality achieved. However, there is a proportion of disputants who felt it very important that the hearings be informal but did not find the hearing to be so. While neither claimants³²¹ nor respondents found that the degree of informality achieved

³²¹ This contrasts with the NZ Study, at 25-28, which found that for claimants at least, the degree of importance matched the degree of informality achieved. See also deVaus,

matched the degree of importance attached to it, respondents, more than claimants, regarded informality as important but less well achieved.³²²

The Magistrates' were divided in their views of informality. The full time Magistrates (Hill and Hemming)³²³ liked the informality and more inquisitorial style. However, some Magistrates from the Court of Requests, sitting only occasionally in a Small Claims motor vehicle cases, admitted not liking the system.³²⁴ Others³²⁵ approved of the system but indicated that their experience and background made them uncomfortable with it. However it is important to make the point that the inquisitorial method is an alternative method to adversarial adjudication; it is not an alternative to adjudication itself.³²⁶ The spirit of the Small Claims Court requires a more inquisitorial judge, but a judge all the same. Moreover, even the passive judge can do significant harm by failing to recognise complaints and defences.³²⁷

Support groups,³²⁸ like disputants, felt that the Court achieved the right balance of formality vs informality, though one member of Consumer Affairs noted that

at 67 (78% of claimants were satisfied with the level of formality; 14% said it was too formal and 8% said it was too informal; this attitude was consistent when controlling for demographic characteristics, except that the younger people and higher educated were more likely to regard the hearings as a little too formal.)

- 322 This was also the conclusion of the NZ Study, at 25-28 (Whilst approximately equal proportions of claimants rated the hearing informal (63%) as rated informality important (64%), more respondents rated informality important (72%) than found the hearing informal (65%)).
- 323 Personal Communication with Mr Hill as noted above, Summary of Interviews, *op. cit.* s 3.
- 324 See R. Beresford, 'It Takes a Big Judge to Handle Small Claims' (Fall 1977) 16 *Judges Journal* 14-17, 53-54.
- 325 For example, Mr Bryant, in an informal interview at the Small Claims Court in February of 1990.
- 326 See J. K. Lieberman (ed), *The Role of Courts in American Society* (1984) (St Paul, Minn, West Publishing Company) at 98-99; S. Bedford, *The Faces of Justice: A Traveller's Report* (1969) (New York, Simon and Schuster) 101-213.
- 327 B. Moulton, 'The Persecution and Intimidation of the Low-Income Litigant as Performed by the Small claims Court in California' (1968-69) 21 *Stanford Law Review* 1669.
- 328 See e.g., Focus Group Interview with Consumer Affairs, Summary of Interviews, *op. cit.* s 5.

sometimes a lay person would not understand the technical reason for the decision.

This delicate balance between formality and informality is also reflected in the physical setting of the hearing room. Here, too, there is an absence of uniformity. The Small Claims hearing room in Hobart is arguably the best Tasmanian example of achieving the correct balance between formality and informality. The room is much smaller than a formal courtroom. Parties sit at a table facing a slightly elevated platform on which is a desk at which the Magistrate sits. The Magistrate presides over the hearing alone, without the aid of a bailiff or court clerk. There is no police officer either in the hearing or close by. The parties have swivel chairs thus making it easy to face each other as well as the Magistrate. The room is also equipped with a white board to assist with illustrations, especially useful for motor vehicle cases.³²⁹ The Magistrate's desk is on a slightly raised platform. The atmosphere is not nearly as formal as a traditional courtroom, yet neither is it completely informal. At the other end of the spectrum are the Small Claims Courts in Launceston and Burnie where Small Claims are heard in the same courtroom as more formal hearings in the Court of Requests.³³⁰

Also, in keeping with the more inquisitorial role of the Small Claims Magistrate, Mr Hemming³³¹ indicated that in particular cases, eg building disputes, motor vehicle accidents, the Magistrate would go to the scene of the dispute and allow parties to present their arguments there, thus better enabling disputants to present their case and saving substantial amounts of court time.

Finally, another feature of informality is the absence of formal judicial garb with the Magistrate dressed in a business suit in contrast to the legal garb worn by judges and lawyers in higher Courts.

329 See the discussion under convenience regarding acoustics, waiting rooms and amenities, section 8 of this chapter.

330 Personal observations of the researcher in visiting Small Claims sites throughout Tasmania during 1990-91.

331 Personal Communication, as noted above, Summary of Interviews, *op. cit.* s 3.

6.7.9 Opportunity to Present Case/ Rules of Evidence

In General

There is no 'fair' treatment of the parties' case if the law of evidence and the manner in which it is administered are not fair. . . In particular, the party's right to be heard obviously includes the rights to present and to rebut evidence; there is no fair hearing if improper limitations of such rights are imposed upon the litigants, or if litigants have a merely formal, not an effective right of access to evidence.³³²

Party control and perceived fairness appear to be closely related. Disputants want to be able to tell their side of the story as they see it.³³³ As in the case of formality, the issue of opportunity to present one's case reflects a delicate balance. The atmosphere must not be intimidating or frightening, yet the proceedings must be imbued with enough formality to engender respect for the judicial process and legitimise the hearing.³³⁴

The basic format for Small Claims hearings is designed to be a simplified version of a regular civil trial. Both parties have the opportunity to present their side of the story and present whatever evidence they have, including the calling of witnesses. The rules of procedure are relaxed and generally the Magistrate will actively question both parties and allow parties to question each other. This is consistent with the perception of the Small Claims adjudicator as an active rather than passive observer. It is also supportive of the chief function of the Magistrate to attempt to get the parties to settle the dispute. As Weinstein puts it:

³³² M. Cappelletti, *op. cit.* 257.

³³³ M. D. Bayles, *Procedural Justice: Allocating to Individuals* (1990) (Boston, Kluwer Academic Publishers) 167.

³³⁴ D. Gould, Staff Studies No. 3. Prepared for the National Institute for Consumer Justice, 6 (1972) at 59-61.

allowing litigants to introduce evidence relatively freely and to rely on hearsay, provided the opponent can call the declarant and otherwise attack him with a minimum of barriers, tends to tranquillise them. This truism is demonstrated repeatedly in Magistrates' courts where a complaining witness pours out his heart to an attentive judge and then, having had his day in court, withdraws his complaint.³³⁵

Informal courts 'allow grievants to let off steam, performing an expressive rather than an instrumental function' and helping to reduce social conflict.³³⁶ Indeed, for some disputants telling one's story is even more important than winning or losing and, as will be explained in section 12, is the key determinant of disputant satisfaction with Small Claims Court.³³⁷

Unfortunately, the 'relational' discourse of disputants is often at odds with the 'rule-based' discourse which characterises formal court procedures.³³⁸ Thus, disputants who are embroiled in what is essentially a relationship problem, and whose actions are dominated by relationship considerations, will often be frustrated by a Small Claims Court which in most respects (burden of proof, rules of evidence, court procedure) 'rule-based'. This is especially so for disputants who because of such factors as gender, class and race have not been 'socialised' into the centers of power in our society.³³⁹

335 J. Weinstein, 'The Ohio and Federal Rules of Evidence' (1977) 6 *Capital University Law Review* 517, 521.

336 R. Abel, *The Politics of Informal Justice* (1982) (New York, Academic Press) at 284.

337 Small Claims Study Group, *Little Injustices: Small Claims Courts and the American Consumer* (1972) (Washington D.C., Center for Auto Safety) at 84-85.

338 Conley and O'Barr (1990), (Chicago, University of Chicago Press) at 173
'Our observation of Small Claims Courts indicates that for many complainants the money sought is not the only, or even the principal payoff desired. The outcome they seek lies in the realm of the psychological: a chance to tell their stories, to expose their indignation, to gain attention from a third party, to act in a role as defender of principle, or gain some other form of emotional and intellectual gratification.'

339 *Ibid.*

Problem of pro se litigants

Most Magistrates³⁴⁰ interviewed were aware there were some problems associated with the fact that parties must present their cases unaided by lawyers. However, the researcher's observations and the opinion of most Magistrates³⁴¹ was that disputants do a surprisingly good job of presenting their own cases. Indeed, most motor vehicle cases are well documented, complete with photographs. Other consumer cases showed a great deal of preparation of exhibits and care taken to document their case.³⁴²

While most disputants appear to be able to conduct their own case, there is still more the Small Claims Court Magistrate and staff can do to ensure that disputants feel comfortable with the court's procedures and know what to expect. For example, twice during my observations the parties, at the end of the hearing and after the Magistrate left the room, turned to me asking if the matter was over and whether they were free to go. This example points to the need for more verbal sign-posting. This point was will illustrated by lawyer Mr Reg Marron³⁴³ of the Hobart Community Legal Service:

I would like to see a sheet on the table in front of each party that sets out clearly the way the proceeding will be dealt with. Eg "The Commissioner's name is Mr You're sitting here, the other party will be sitting here. The order of events is: The estimated time for the matter is
" What often happens is that matters often move off the rails on some intractable matter. If the sheet were there the Magistrate could say "we're up to no 3 Mr Smith". People can't deal with the abstract and things need to be spelt out clearly. A checklist/agenda would be very helpful. People need

340 See e.g., Summary of Interviews, Mr Hemming and Mr Hill; cf Mr Chen, *op. cit.* s 3.

341 *Ibid.*

342 Iowa Small Claims Study, at 504 (most judges said there was a problem with litigants not knowing how to prepare for trial, though 44% stated the problem was minor; 36% ranked it as moderate and 12% as a major problem).

343 Personal Communication as noted above, See Summary of Interviews, *op. cit.* s 5.

to be aware of the expected time, not to put a stopwatch on them, but to focus their attention on important matters.

Unfortunately, my experience is that there are also those who are unhappy with the result of the Small Claims case because they feel their evidence wasn't heard, or that they didn't get enough say, etc. Whenever you have a loser and a winner, this will always occur. However, people will be more supportive of the court if they understand exactly how it works.

In addition to 'menu cards' and similar devices, the Justice Department should also consider an instructional video which explains, and more importantly, illustrates what is expected of parties who conduct their own cases in the Small Claims Court. Ideally, such a video could be viewed at the court with disputants able to select what aspects concerning which they feel they need help. Also, a copy could be made available to take home, subject to a deposit fee which could be refunded to the disputant upon the return of the video cassette.

Presentation of Evidence

The Tasmanian legislation³⁴⁴ provides that the evidence may be taken on oath or affirmation³⁴⁵; be given orally or in writing³⁴⁶; and that, subject to rights and claims of privilege, the Magistrate may require a person to appear before him and to bring documents, books or things as requested in the notice to appear.³⁴⁷ Despite the best efforts of courts to inform litigants, the fact is that some parties will front up to trial without the necessary evidence or witnesses to establish their cases. The Tasmanian legislation gives the Magistrate considerable discretion in the conduct of the trial. The researchers observations and interviews³⁴⁸ revealed that the Magistrate could and did use this discretion

³⁴⁴ *Magistrates Court (Small Claims Division) Act 1989* (Tas), s 25.

³⁴⁵ *Ibid* s 25(a).

³⁴⁶ *Ibid* s 25(c).

³⁴⁷ *Ibid* s 25(b).

³⁴⁸ See Summary of Interviews, *op. cit.* s 3.

to take reasonable steps to assure that justice was done between the parties and that the decision was made on the merits of the case. For example, among the strategies employed by the full-time Small Claims Magistrate were: granting a continuance of the case until the witnesses or documents were available; suggesting questions a party might want to ask or issues which should be raised, and so on. If the site were crucial, the Magistrate might also go to the accident site. This was especially valuable in motor vehicle cases. The Magistrate might also invoke a statutory procedure whereby the Court can call for an expert report.³⁴⁹ This is most often done in building disputes and motor vehicle repair cases. Finally, liberal use is made of affidavits and statutory declarations because of the difficulty of getting assessors and similar experts to leave work in order to appear in Small Claims.³⁵⁰

From my observation of 50 Small Claims hearings, disputants appeared to have little difficulty in understanding the evidentiary requirements of the claim. However, some of the Consumer Affairs people noted that at times even they did not understand, nor did consumers, 'various technical points of proof, for example related to misrepresentation'.³⁵¹ This has also been the conclusion of some researchers.³⁵² Nevertheless, the overwhelming impression evident in the cases observed was that disputants were very well prepared. Most disputants involved in motor vehicle cases made liberal use of whiteboard, drawings, and/or photographs. Where such evidentiary aids were not present, the Magistrate himself would sometimes go to the accident site. Disputants involved in consumer claims tended to have witnesses, contractual documentation, a diary of phone calls, notes of conversations, etc. In large part, the high level of preparation was no doubt do to the emphasis placed on such matters by court staff, registrars, Magistrates and court brochures.

349 *Ibid* s 24.

350 Compare M. Turner, 'The Magistrates' Court Act 1989: A Commentary on the Forms and Procedures for Complainant's Arising from a Motor Vehicle Collision' in *The New Magistrates' Court Act: Seminar Papers* (Melbourne, Leo Cussen Institute) 1990 which recommended more liberal use of affidavits and written forms of evidence.

351 This is contrary to the findings of Ingleby (1991), *op. cit.* 40 'Small Claims plaintiffs were not always clear about the desirability of being able to substantiate claims with written evidence if their claim were to be made out on the balance of probabilities'. He further suggests that these problems were 'due to the absence of legal representation'.

352 Ingleby (1991), *ibid*.

The Experienced versus the Inexperienced Disputant

The Magistrates interviewed did not appear to have any difficulty with cases in which an experienced and able party was matched against a disputant who was comparatively inexperienced and far less able.³⁵³ It was the view of the Magistrates that the inquisitorial role allowed the Magistrate³⁵⁴ to look after the interests of the weaker party.³⁵⁵ This was especially so in motor vehicle cases where an insurance agent may appear with one disputant against an inexperienced disputant on the other side.

The perceptions of the Magistrates were also supported by the disputant survey data which showed that being a repeat user did not correlate with a higher success rating, nor was there any evidence that repeat users were more likely to state that the decision was fair, that the Magistrate was fair in the way he conducted the hearing, or that they would use the Small Claims Court again.

Duration of the Hearing

Small claims hearings are, compared to traditional adversary trials, of brief duration. In Tasmania, an hour is set for each hearing, which is more than ample for the vast majority of cases.³⁵⁶ In view of the need of disputants to be able to tell their own story, it is important that problems of delay³⁵⁷ and need to 'get through the docket' do not place pressure on the Magistrate to rush proceedings.³⁵⁸ For the most part, however, the Tasmanian system seems to have achieved the correct balance between these goals.

353 Iowa Small Claims Study, at 502. In a system where lawyers are allowed, only 37% of the judges interviewed stated it was difficult to try a case where only one party was represented by an attorney.

354 See e.g. Interview with Magistrate Hemming, Summary of Interviews, *op. cit.* s 3.

355 See R. Ingleby (1991), *op. cit.* 35; and I Ramsay, 'Small Claims Courts in Canada: A Socio-legal Appraisal' in Whelan, *op. cit.* 33. (much of the time spent by the Small Claims adjudicator is spent doing what a lawyer would do if legal representation were allowed--sifting through the conflicting evidence in an attempt to ascertain the facts).

356 Iowa Study, 497-498 (Found that 38% of plaintiffs and 22% of defendants stated they were less than 15 minutes. 'Only a few of the litigants surveyed complained that the judge did not give them enough time to tell their side of the story').

357 The issue of delay in Small Claims Courts is discussed in section 13 of this chapter.

358 Ruhnka and Weller, *op. cit.* 21-22 (most judges recognised the therapeutic function of giving parties a chance to tell their side of the story). Also, Gould, *op. cit.* 224 found the goal of many litigants is to 'have their day in Court regardless of the outcome.';

Perception of Disputants

Disputants were asked the extent to which they felt they had the opportunity present their case, to tell their side of the story. As shown in Table 56, the Tasmanian Small Claims Court rated highly on this scale, especially amongst claimants.³⁵⁹

Table 56: Did Disputants have the Opportunity to Put their Side of the Case

Response	CLAIMANTS		RESPONDENTS	
	Freq	%	Freq	%
Yes	175	86.6%	58	65.9%
No	27	13.4%	30	34.1%

- Notes
- 1. Base: disputants attending hearing
 - 2. No response: 20 claimants; 30 respondents

Those disputants who stated that they did not have the opportunity to present their case were asked to indicate in what ways this was so. Note that the responses seem to fall into two large categories: those who blame the procedure and those which impugn the impartiality of the Magistrate. Also, losers tended to blame their loss on procedures and bias of the Magistrate rather than on the merits of their case.³⁶⁰ Ingleby³⁶¹ and Ramsay³⁶² have suggested that despite the merits of allowing parties to present their case, the reality is that most of the Magistrate's time is spent as an inquisitor, sifting through conflicting evidence in an attempt to get at the facts. If one thinks about the

Note, Small Claims Courts: Reform Revisited (1969) 5 *Colum. J.L. & Soc. Probs* 47, at 56 ('At its best, the Small Claims Court lets the litigants participate and understand what happens to them.').

359 DeVaus, at 75. Compare the Small Claims Tribunal in Victoria in which deVaus found 77% of claimants felt they had a reasonable chance to put their side of their case; while 23% felt they did not. Also losers tended to blame their loss on procedures rather than their case.

360 DeVaus, at 75 drew similar conclusions ('When asked why they had not been able to put their side of the case properly the most common reason was nervousness and uncertainty about what to do.') But see, and (Rather than allowing the presentation of evidence, most of the time spent by the Small Claims adjudicator is spent doing what a lawyer would do if legal representation were allowed--sifting through the conflicting evidence in a summary manner in an attempt to ascertain the facts.).

361 Ingleby (1991), *op. cit* 35.

362 I Ramsay, 'Small Claims Courts in Canada: A Socio-legal Appraisal' in Whelan, *op. cit* 33.

presentation of a case in the abstract, Ingleby and Rasmsay are no doubt correct. However, perhaps a better comparison would be that Small Claims disputants, vis-a-vis their counterparts in traditional proceedings dominated by lawyers, have a greater opportunity to present their side of the case. This is because most Small Claims disputants personally complete and file their claim form, prepare arguments, arrange witnesses and conduct themselves at the hearing, albeit a hearing in which the Magistrate operates in a much more inquisitorial fashion than if lawyers were present. Using this point of comparison, it is understandable that Small Claims disputants could feel satisfied that they had had the opportunity to present their case.

Table 57: Why Claimants stated they had no Opportunity to Present Their Case

Response	Freq	%
M wouldn't listen	4	33.3%
No opp for Cross-X	3	25.0%
M was biased	1	8.3%
Low education, felt intimidated	1	8.3%
50-50 compromise	1	8.3%
Disputant could only answer O	1	8.3%
No right of appeal	1	8.3%

- Notes
1. Base: claimants who said they did not have an opportunity to present case
 2. Small numbers, therefore percentages require caution

Table 58: Why Respondents stated they had no Opportunity to Present Their Case

Response	Freq	%
M wouldn't listen	9	29.0%
M was biased	5	16.1%
M already mind made up	3	9.7%
M not weigh evidence	2	6.5%
Too much pressure to settle	2	6.5%
Low education, felt intimidated	2	6.5%
Felt on trial	2	6.5%
Too formal	2	6.5%
50-50 compromise	2	6.5%
Party absent	1	3.2%
Too rushed	1	3.2%

6.7.10 Magistrate's Fairness in Controlling the Hearing

Disputants were asked to rate how fair the Magistrate/Commissioner was in controlling the hearing. There was a reasonable level of satisfaction apparent (73% of claimants and 71% of the respondents).³⁶³

Table 59: How Fair Was the Magistrate in Controlling the Hearing?

Response	CLAIMANT		RESPONDENT	
	Freq	%	Freq	%
Very fair	96	47.1%	43	33.3%
Quite fair	52	25.5%	48	37.2%
Not very fair	29	14.2%	20	15.5%
Not at all fair	27	13.2%	18	14.0%

- Notes:
- 1. Base: disputants attending hearing
 - 2. No response: 18 claimants; 16 respondents

Those few who had rated the Magistrate/Commissioner negatively were asked in what ways the Magistrate/Commissioner was not fair in controlling the hearing. Among the responses were:

Table 60: Ways Claimant Thought Magistrate Unfair in Controlling Hearing

Response	Freq	%
M was intimidating, derogatory, unsympathetic	6	16.7%
Biased	5	13.9%
M took insufficient notice of witness' evidence/mind made up	4	11.1%
Too much pressure to settle	4	11.1%
Favoured verbal testimony over written receipts	4	11.1%
Listened to other side only, no rt to cross-x	4	11.1%
Reference to previous cases of disputant in SC ct	3	8.3%
M unaware of facts/failed to explore fully	2	5.6%
More interested in technicality/ formalities than justice	2	5.6%
M was inconsistent	2	5.6%

³⁶³ NZ Study, at 31 (82% of claimants and 72% of respondents perceived the referee as being fair in controlling the hearing).

Table 61: Ways Respondent Thought Magistrate Unfair in Controlling Hearing

Response	Freq	%
Listened to other side only, no rt to cross-x	14	33.3%
Biased	11	26.2%
M took insufficient notice of witness' evidence/mind made up	8	19.0%
M was intimidating, derogatory, unsympathetic	5	11.9%
Too much pressure to settle	3	7.1%
M unaware of facts: failed to explore fully	2	4.8%
More interested in technicality/ formality than justice	2	4.8%
Favoured verbal testimony over written receipts	1	2.4%
Resp Did not attend	1	2.4%
None	1	2.4%

Notes:

1. Base: Respondents who stated M was not fair in controlling the hearing

6.7.11 Record of the Proceedings.

A Magistrate is not required keep a record of evidence given in a proceeding before him but shall make: a) a summary for the facts in dispute and any orders made;³⁶⁴ and b) notes of the proceeding. Upon completion of the proceeding, the notes are forwarded to the registrar.³⁶⁵

The reason the Magistrate does not have to keep a record of evidence is that there is no appeal on the merits. This restriction on appeal helps the Court ensure that disputes will be resolved quickly and with a minimum of formality.

6.7.12 Summary

The role of the Small Claims Magistrate is an especially challenging one in which the Magistrate is required to assume an active role as fact finder and adjudicator and at the same time must deal with inexperienced *pro se* litigants all in a setting in which there is limited time and resources.

Small Claims are not necessarily simple claims and can involve extremely complicated factual disputes as well as parties with volatile personalities and a prior history of ill will between them.

³⁶⁴ See *Magistrates Court (Small Claims Division) Act 1989 (Tas)* s 9(1)(b).

³⁶⁵ *Magistrates Court (Small Claims Division) Act 1989 (Tas)* s 25(4).

As a result of these challenging tasks given to the Small Claims Magistrate, the quality and excellence of a Small Claims Court is more dependent on the skills and quality of its Magistrates than any other single factor.

While the concepts of 'justice' and fairness are difficult to define, traditional measures such as impartiality, fairness of the Magistrate and opportunity to present one's case, when applied to the Small Claims Court, suggest that the system has proven to be 'accessible' to *pro se* litigants.

The full time Magistrate for Small Claims, Mr Hemming, appears to be coping extremely well with his challenging role. However, several of the part-time Small Claims Magistrates were ill at ease and uncomfortable with the demands placed upon the Small Claims judge.

Disputants generally considered themselves well prepared for the hearing. Almost a third (32%) of the claimants and 37% of the respondents went to a lawyer for advice. Those who went to a lawyer usually considered it to be to their advantage (65% of claimants; 59% of respondents). Of those who did not go to a lawyer 14% of claimants and 24% of respondents thought, in hindsight, it would have been helpful to have gone to a lawyer.

Approximately a third of disputants sought legal advice from a lawyer prior to their Small Claims hearing and most thought this was to their advantage.

Compared to those who saw a lawyer before hand, those disputants who did not consult a lawyer were more likely to state that the decision was fair, that they had an opportunity to present their case, and that they would use the system again. This suggest that a majority of disputants feel competent enough to handle their own case and perceive the benefits of Small Claims Court outweigh any detriment caused by the absence of legal representation. Perhaps also there is greater inherent satisfaction in totally conducting one's own case, rather than relying on a lawyer to 'coach' one through. Finally, though the returns on socio-economic background data were too poor to support this as a finding, it is likely that those who knew about Small Claims, but did not see a lawyer, were self-selected in that such disputants were likely to be comparatively well-educated and motivated to pursue their own case and thus more likely to be satisfied that the hearing was fair, that they had an opportunity to present their case, etc.

The majority of disputants did not think lawyers should be allowed to participate in Small Claims. However, as expected, those disputants who thought the decision was unfair or that they did not have an opportunity to present their case, were more likely to state that lawyers should be allowed in Small Claims.³⁶⁶ The Magistrates generally agreed with this view but noted that in rare cases there may be some circumstances when the presence of lawyers is desirable.

Approximately 20% of the disputants surveyed had their insurance representative participate at their hearing. The vast majority of these disputants (72% of claimants and 62% of respondents) considered it an advantage to have their insurance representative there. The most frequently cited advantages were 'moral support', help with factual details and help with court procedures. However, some Magistrates, Court administrators and especially Consumer Affairs and the Hobart Community Legal Service contended that some insurance companies abuse the system by forcing their insureds into Small Claims and utilising the Court to 'take a cheap punt' on having to pay less on the policy. At the time of this study, there was also considerable confusion about the legal status of an insurance company in Small Claims Court.

Most disputants knew before the hearing that they could call witnesses although only a small percentage of disputants were aware whether or not the other party was going to bring a witness. Most disputants (81% of claimants and 61% of respondents) who utilised a witness considered that it was to their advantage to do so.

Hearings were overwhelmingly considered to be private and privacy of hearing was rated as important by approximately three quarters of disputants.

Hearings were rated as reasonably informal - 58% of claimants and 53% of respondents regarded them as quite or very informal. However, 69% of claimants and 75% of respondents stated that it was important that hearings be informal. Thus, the reality of Small Claims did not match their expectations in this regard.

³⁶⁶ The interrelationship of these factors are discussed more fully in Section 12 of this chapter.

An overwhelming number of claimants (87%) and a strong number of respondents (66%) stated that they felt they were given the opportunity to present their side of the case. As will be explained in Chapter 12, this is one of the most important determinants of user satisfaction of Small Claims Courts.

Magistrates were regarded as being fair in the way they controlled the hearing by 63% of claimants and 71% of the respondents.

6.8 CONVENIENCE³⁶⁷

6.8.1 Convenience in Attending Hearing

If it is inconvenient to attend the Small Claims Court, then disputants will be discouraged from pursuing their claims. Historically, the administrators of the Tasmanian Small Claims system have, until recently, been more concerned about operational efficiency than user convenience. Insightful is the opinion of the Court's first Registrar³⁶⁸ who indicated that while the system was generally operating well, it was important to focus now on the users of the system to make it more accessible:

The only thing I suppose that we didn't do, we really didn't look at user needs. We are addressing that now and that is one reason why I put the map on the documents so that people can get here. We have also put a bit more information in the room, sign writing on the doors is yet to come and a redraft of the pamphlet. To try to get users to understand it easier and to see that it's a bit more accessible.

This section, evaluates the extent of user convenience in regard to the Tasmanian Small Claims Court and examines some of the ways in which the Small Claims Court might be made more convenient

Disputants were asked to indicate, in general terms, how convenient it was for them to attend the hearing. A significant percentage of the claimants (approx one fourth) and respondents (one third) regarded it as inconvenient to attend the hearing (Table 62).³⁶⁹ Several disputants, hearing about the present study, also phoned the researcher to complain that they were forced to lose up to a day or more of work; that the Court seemed unconcerned about the demands taken on the litigant's time. The survey responses also showed the major reason for

³⁶⁷ To the extent that issues of convenience also impact upon accessibility issues they were dealt with in section one of this chapter.

³⁶⁸ Personal Communication with Mr Barry Hamilton, as noted above, see Summary of Interviews, *op. cit.* s 4.

³⁶⁹ NZ Study, at 33 (26% of claimants and 39% of respondents said that it was inconvenient to attend the hearing).

perceived inconvenience related to difficulties with work (Tables 63-64).³⁷⁰ The details regarding specific aspects of convenience (work, child care, absence of Saturday or evening hearings etc) are discussed more fully below.

Table 62: Degree of Convenience in Attending the Hearing

Response	CLAIMANT		RESPONDENT	
	Freq	%	Freq	%
Very conv	23	11.4%	15	11.5%
Quite conv	88	43.8%	32	24.6%
Neither	39	19.4%	37	28.5%
Quite inconv	31	15.4%	28	21.5%
Very inconv	20	10.0%	18	13.8%

- Notes
- 1. Base: disputants who attended hearing
 - 2. No response: 21 claimants; 15 respondents

Table 63: Claimants' Reasons Why it was Inconvenient to Attend Hearing

Response	Freq	%
Difficulties with work	34	32.1%
Too long	17	16.0%
Wrong time of day	13	12.3%
Location of Court	13	12.3%
Other	13	12.3%
Transport	10	9.4%
Family arrangement	5	4.7%
All the above	1	0.9%

- Notes:
- 1. Base: claimants who stated it was inconvenient
 - 2. More than 1 response was possible
 - 3. Avg number of inconveniences given: 2.2

370 This was also true of the NZ Study, at 34 (Difficulties with work (69% of claimants and 56% of respondents; followed by location of tribunal, wrong time of day, transport, took too long, family arrangements, other reasons).

Table 64: Respondents' Reasons Why it was Inconvenient to Attend Hearing

Response	Freq	%
Work difficulties	28	34.1%
Wrong time of day	14	17.1%
Too long	13	15.9%
Court location	8	9.8%
Family arrangements	7	8.5%
Other	7	8.5%
Transport]	5	6.1%

- Notes
1. Base: Respondents who stated it was inconvenient to attend hearing
 2. More than one response was possible
 3. Average Number of inconveniences mentioned= 1.78

6.8.2 The Relationship of Convenience to Disputant Satisfaction with Small Claims

As one would expect, those people who thought it was convenient to attend were more likely to be satisfied overall. Conversely, those who felt it convenient were more likely to register dissatisfaction in their overall rating of the Small Claims Court. Disputant satisfaction is discussed in detail in section 12 of this Chapter.

Table 65: Convenience by Satisfaction Rating

% satisfied	DISSAT	SATIS	TSAT	N
Very Convenient	21.05	42.11	36.84	19
Quite Convenient	33.73	39.76	26.51	83
Neither conv/inconv	37.14	48.57	14.29	35
Quite inconvenient	33.33	40	26.67	30
Very inconvenient	36.84	42.11	21.05	19
Total	33.33	41.94	24.73	186

- Notes
1. Dissatisfied: 0-4; Satisfied: 5-9; Totally satisfied: 10
 2. PEARSON CHI-SQUARE 4.501, DF 8; Prob 0.809
 3. GOODMAN-KRUSKAL GAMMA -.1101

6.8.3 Arrangements with Work

Half of the disputants indicated that they had to take time off paid employment (Table 66).³⁷¹ Approximately a third of claimants and a quarter of respondents stated that this involved less than two hours, while approximately half stated that they lost 2-4 hours work (Table 67). However, of those taking time off work, approximately a third of claimants and 41% of respondents actually lost pay (Table 69). A small percentage of disputants were required to take annual leave in order to attend their Small Claims hearing (Table 68). These figures should be considered when considering the 'cost' of pursuing a small claim. Indeed, when one considers that a lost day at work can cost several hundred dollars, the idea of pursuing the average small claim (approximately \$800) looks increasingly unattractive. Another 'chilling' factor to Small Claims Court access is that witnesses, who are not paid, will be less likely to agree to testify if to do so means that they must lose a day's pay for the privilege. These points highlight the need for the Court to monitor its scheduling so that such costs can be minimised and access to justice thereby encouraged.

Table 66: Whether Disputants Had to take Time off Paid Employment

Response	CLAIMANTS		RESPONDENTS	
	Freq	%	Freq	%
Yes	104	52.3%	59	50%
No	95	47.7%	59	50%

- Notes
- 1. Base: claimants who attended hearing
 - 2. No response: 23 claimants

³⁷¹ New Zealand Study, at 35. The NZ figures were similar (52% of claimants and 49% of respondents stated that they took time off paid employment). See also Massachusetts Public Interest Research Group, Inc, *The Plight of the People's Court: An Analysis of Massachusetts Small Claims Courts* (1982) (Boston, Massachusetts Public Interest Research Group, Inc)(63% of plaintiffs and 57% of defendants had to take time off from work to attend their hearing).

Table 67: Number of Hours Taken Off Paid Employment to Attend Hearing³⁷²

Response	CLAIMANTS		RESPONDENTS	
	Freq	%	Freq	%
Less 2	40	33.3%	18	25.7%
2-4 hrs	55	45.8%	36	51.4%
4-6 hrs	11	9.2%	7	10.0%
6 plus	14	11.7%	9	12.9%

- Notes
1. Base: those who took time off paid employment
 2. Some answered this question who did not answer 'yes' to the previous question

Table 68: Whether Disputants Took Annual Leave in order to Attend Small Claims

Response	CLAIMANTS		RESPONDENTS	
	Freq	%	Freq	%
Yes	3	2.6%	3	5.0%
No	114	97.4%	57	95.0%

- Note
1. Base: Disputants who attended hearing

Table 69: Whether Disputants Who Took Time Off Paid Employment Lost Any Pay

Response	CLAIMANTS		RESPONDENTS	
	Freq	%	Freq	%
Yes	41	32.5%	29	41.4%
No	85	67.5%	41	58.6%

Notes: Base: those who took time off paid employment

6.8.4 Arrangements for Children

Disputants were asked whether they had to make special arrangements to have their children looked after (Tables 70 and 71). If so, they were further asked to

³⁷² NZ Study, at 35 (most took off less than four hours, though NZ litigants were more likely to state less than 2 hours; and Tasmanians over 2 hours and up to 4 hours).

indicate how many hours this involved.³⁷³ Only 10% of disputants reported requiring child care. The Consumer Affairs focus group³⁷⁴ also concluded that the provision of child care so that disputants could attend their Small Claims hearing was unnecessary. In contrast, Registrar Paul Huxtable,³⁷⁵ commented that from his experience, the number of disputants who stated that they needed child care was understated. He based this opinion on the fact that it is not uncommon for disputants to bring children along with them to the hearing. Also, a number of disputants have inquired about the availability of child care. Interviews with Consumer Affairs³⁷⁶ and some Magistrates³⁷⁷ suggested that, while it would be wonderful for the Court to provide child care services, it was not economically feasible to do so, especially given a period of limited government resources.

Table 70: Was Child Care Required?

Response	CLAIMANTS		RESPONDENTS	
	Freq	%	Freq	%
Yes	19	10.1%	11	9.7%
No	169	89.9%	102	90.3%

Notes

1. Base: disputants attending hearing
2. No response: 34 claimants; 5 respondents

Table 71: How Many Hours Required for Child Care?

Response	CLAIMANT		RESPONDENT	
	Freq	%	Freq	%
2 less	9	50.0%	4	
2-4 hrs	6	33.3%	6	
4-6 hrs	2	11.1%	1	
6 plus	1	5.6%		

- Notes: 1. Base: those who had to make special arrangements for child care; 2. Small numbers, therefore interpretations must be treated with caution; 3. No percentages computed for Respondent because number involved was too small

373 NZ Study, at 36 (5% of claimants and 12% of respondents had to make special arrangements for children).

374 Focus Group Discussion with Consumer Affairs, Summary of Interviews, *op. cit.* s 5.

375 Personal Communication with Mr Huxtable, as noted above, Summary of Interviews, *op. cit.* s 4.

376 Consumer Affairs Focus Group, Summary of Interviews, *op. cit.* s 5.

377 E.g, Magistrate Hemming, Summary of Interviews, *op. cit.* s 3.

6.8.5 Desirability of Night or Saturday Court Sittings

Disputants were asked whether they favoured the holding of Small Claims Court sessions during the evening (Table 72) or on Saturdays (Table 73). Approximately two-thirds of disputants were opposed to such times, some commenting that it would cost too much money for the government to provide such service. However, when one considers that a third of disputants would support weekend and evening sessions, some thought should be given to a compromise position, eg one evening fortnight and one Saturday a month which might be introduced on a pilot basis for a trial period.³⁷⁸

Magistrates³⁷⁹ and supporting groups³⁸⁰ acknowledged it would be a good idea, but also noted the constraints imposed by extra operating costs, such as security, penalty rates etc.

Table 72: Would You be in Favour of Night Court Sittings?

Response	CLAIMANT		RESPONDENT	
	Freq	%	Freq	%
Yes	62	31.5%	48	39.7%
No	132	67.0%	74	61.2%
Don't know	3	1.5%		

Notes

- 1. Base: claimants attending hearing
- 2. No response: 25 claimants; 23 respondents

³⁷⁸ See Ruhnka and Weller, *op. cit.* 127-131 (In their study of 15 Courts, experiments with an evening program met with mixed results. For example, the Grand Rapids Michigan Court found little interest in such sessions. However, in New York City all sessions are during the evening and the system appears to work very well). See also, S. R. Comment, 'Report on the Kansas Small Claims Procedure' (1975) *Journal of the Kansas Bar Association* 44; DeJong, *Small Claims Court Reform* ('...nearly every critic of Small Claims procedures has recommended that the Courts schedule evening or weekend sessions' at 4).

³⁷⁹ See Summaries of Interviews, *op. cit.* s 3.

³⁸⁰ *Ibid.* s 5.

Table 73: Would You Be in Favour of Saturday Court Sitings?

Response	CLAIMANTS		RESPONDENTS	
	Freq	%	Freq	%
Yes	81	40.3%	40	33.1%
No	119	59.2%	81	66.9%
Don't Know	1	0.5%		

- Notes:
1. Base: disputants attending hearing
 2. No response: 21 claimants; 24 respondents

6.8.6 Physical Aspects

The descriptions and discussion contained in this section are the result of personal observations conducted at the Small Claims Courts located in Hobart, Burnie, Devonport and Launceston as well as interviews with Court staff and Magistrates.³⁸¹

Many physical aspects of Small Claims Courts in Tasmania were discussed in section one of this Chapter. This sub-section will comment only on the major

³⁸¹ Other writers have conducted similar research. See e.g., Borrelli, *op. cit.* Chapter 2 (concluded that the Small Claims Court was not a plaintiff's Court as earlier literature suggested. Rather many plaintiffs resorted to it as a last option against an unreasonable defendant who even in the case of judgment could ignore the Court); 'The Small Claims Session'; Consumer Council, *Justice Out of Reach, A Case for Small Claims Courts* (1970) (London, Her Majesty's Stationery Office) (Consumer's plea for a Small Claims Court); C. A. McEwen, and R. Maiman, 'Mediation in Small Claims Court: Achieving Compliance Through Consent' (1984) 18 *Law and Society Review* 11-49 (comparing enforcement results with adjudicated as opposed to mediated cases); T. N. McFadgen, 'Dispute Resolution in the Small Claims Context: Adjudication, Arbitration, or Mediation?', unpublished LLM thesis, Harvard Law School, 1972 (observation of 15 sessions of Cambridge Mass Small Claims Court); B. A. Moulton, 'The Persecution and Intimidation of the Low-Income Litigant as Performed by the Small Claims Court in California' (1968-69) 21 *Stanford Law Review* 165-1684, at 1662-1669 (a revealing picture of low income defendant's plight against plaintiff debt collectors); W. M. O'Barr and J. M. Conley, 'Litigant Satisfaction versus Legal Adequacy in Small Claims Court Narratives' (1985) 19 *Law and Society Review* 661-701 (analysis of disputant testimony in Small Claims and the perceptions of disputants to the Small Claims process); Ruhnka and Weller, *op. cit.* (a comprehensive study of 15 different Small Claims Court systems in the United States); Small Claims Study Group, *Little Injustices, Small Claims and the American Consumer* (1972) (Washington D.C., The Center for Auto Safety) at 182-195 (observations by researchers of number of Small Claims hearings).

aspects of the physical setting of Small Claims Courts in Tasmania's four major population centres. Appendix F contains a more detailed description of the physical layout of Small Claims Courts in Tasmania as compiled from the researcher's field notes and interviews.

Southern Tasmania

Compared to the physical setting in the other regions, the Hobart Small Claims Court setting is most suitable to the aims and purposes for which the Small Claims division was established. There is an ample waiting room. The hearing room was specifically designed and furnished to accommodate Small Claims actions. The room is smaller than a formal courtroom and far less formal with the Magistrate sitting on a slightly raised platform. The major problems in the physical setting for Small Claims in Hobart relate to acoustics, lighting, accessibility to the hearing room, absence of private settlement rooms. The Hearing room is located just below a stereo shop and testing by customers of the upper limits of speaker volumes occasionally pierces the judicial setting. The lighting is also poor and getting to the hearing room requires one to negotiate two flights of stairs, thus making it difficult for elderly people or those suffering physical disabilities. There is no separate or specially designated room where the parties can meet to discuss settlement possibilities.

Northern Tasmania

In contrast to the Southern part of the State, there appears to be no effort made in Launceston to accommodate the physical setting of the Court to the special needs of Small Claims. This is despite the fact that the number of Small Claims hearings has doubled in the last few years. Small Claims hearings are conducted in an old stone Courthouse with the police gaols at the back and in a very formal and large Courtroom in which are heard civil and criminal cases at all levels. Indeed, it is not uncommon to find Small Claims cases scheduled so that Small Claims disputants take their place on the waiting benches with criminal defendants in handcuffs and escorted by police. While the Launceston Court location is easier to physically access, the sign-posting for Small Claims is non-existent and the filing counter makes no accommodation for the privacy or other needs (such as interpreters) of Small Claims disputants.

Northwest Tasmania: Devonport

The Small Claims hearing room in Devonport is commendable for its informality. It is in reality a small library with a long table and large desk with 6 chairs lining the wall at the back. The room is generally well lit and heated, but there is no facility for demonstrative evidence - a big failing considering that approximately 40% of the cases are motor vehicle accident cases. Acoustics appear to be adequate, though there is a little traffic noise from the street outside. The other major weaknesses in the physical setting relate to sign-posting, unavailability of meeting rooms, and the inaccessibility of the filing counter. There is no sign to indicate that the room serves as a hearing room for Small Claims. Assuming one makes it up the two flights of steep stairs to the filing counter and goes to the Registrar's Office, there is little privacy or confidentiality. While there is a waiting room, there is no room generally available for litigants to confer about the possibility of settlement.

Northwest Tasmania: Burnie

Burnie, like Launceston, utilises a traditional courtroom to hear Small Claims. Burnie does, however, have the advantage of several rooms available for possible conferences. However, it was unclear how often they were used for this purpose. The general amenities such as parking, phone and coffee were best in this location of the State. However, as in the other regions, clear signs and the availability of information about Small Claims was generally lacking.

6.8.7 Summary

Speaking of Courts in the United States, Church has noted that Courts have not until recently thought of consumers.³⁸² This is also true of the Tasmanian Small Claims Court, a fact which was acknowledged by Mr Hamilton,³⁸³ the Court's first registrar. It must be realised that the setting on which a Small Claims Court operates and convenience issues are important facets of access to the Court and as such should receive due consideration.³⁸⁴

382 See T. W. Church, 'A Consumer's Perspective on the Courts' (1990) (Carlton South, Victoria, Australian Institute of Judicial Administration).

383 Personal Communication with Mr Hamilton, as noted above, Summary of Interviews, *op. cit.* s 4.

384 Borrelli, *op. cit.* (at 273) reported similar occurrences:

One litigant was so incensed by the Court's disregard for its litigant's time that he contacted me by mail after his interview. Among the other points raised in a three-page, single-spaced, typewritten letter, he noted:

A majority of claimants (55%), but only 36% of respondents considered that it was convenient to attend the hearing.

The main reason for the inconvenience was difficulties with work (32%) followed by the length of hearing (16%); wrong time of day (12%) and the location of the Court (12%).

Approximately half the disputants took time off paid employment to attend the hearing, and a third of the claimants and 41% of the respondents lost pay.

About 10% of disputants had to make special arrangements for child care so that they could attend Small Claims.

Approximately a third of those surveyed would be in favour of night Court sittings (31% claimants; 40% respondents) or Saturday Court sittings (40% claimants; 33% respondents).

Given the fact that Small Claims Courts are 'people courts' the physical facilities devoted to Small Claims are in many respects inadequate. Although the physical aspects of Small Claims Courts have been improved since the period of this study, still more resources should be devoted to improving this aspect of the system. Hobart is the only court site which has modified its hearing room specifically to suit the needs of Small Claims disputants. Facilities in the North and NW regions of the state require significant modifications especially in regard to hearing and waiting rooms. If Small Claims Courts are to be 'people's courts' they must consider more the needs of those who increasingly utilise them.

The most important commodity, time, that man possesses appears to have little value in Court. In general you must budget a day away from your job. This is very expensive for those on hourly pay or small businessmen who appear to be the majority of the plaintiffs. . . I would say that at least half of my sessions have had one or more interruptions. Similar convenience problems were reported by Ruhnka and Weller, *op. cit.* 84-88.

6.9. THE OUTCOME

6.9.1 Outcome by Agreement or Decision

In section six of this chapter, we saw that two thirds of disputants responded that they came to Small Claims wanting the Magistrate to make a decision as opposed to seeking an agreement with the other party. In contrast to what they wanted to happen, disputants who attended a hearing were further asked what actually did happen by indicating which of the following statements best described the outcome of their hearing:

'You and the respondent/claimant reached an agreement'

'The Magistrate/Commissioner made a decision'

The vast majority of disputants (91% of claimants and 89% of the respondents) stated that the Magistrate made a decision as to the outcome of the hearing; approximately 10% of disputants stating that they had reached an agreement.³⁸⁵ These figures were as expected and suggest that even when attending a hearing, a percentage of disputants settled either just before or during it. Also, claimants and respondents who were in the same dispute were generally in agreement as to the outcome of the hearing. Finally, there was no statistically significant difference between a disputant's level of satisfaction with the Small Claims Court and whether they had reached an agreement or the Magistrate had made a decision.

Table 74: Description of Outcome of Hearing

Response	CLAIMANTS		RESPONDENTS	
	Freq	%	Freq	%
Reached Agreement	19	9.3%	13	10.3%
M made decision	186	90.7%	112	88.9%
Undecided			1	0.8%

- Notes
- 1. Base: claimants attending hearing
 - 2. no response: 17 claimants; 19 respondents

³⁸⁵ NZ Study, at 41-41 found 84% stated referee had made a decision. Also, claimants and respondents of the same dispute were generally in agreement with the outcome of the hearing.

6.9.2 Reasons Provided for the Decision

'Fairness, and certainly, the appearance of fairness, requires that the losing party be given a brief explanation of why he lost.'³⁸⁶ Furthermore, if parties understand why they lost, there may be an 'educational effect' which may assist that party in avoiding similar problems in the future.³⁸⁷ The researcher's observations and numerous interviews revealed that the Magistrate, without exception, gave reasons for his decision, unless that decision was reserved for decision at a later date, in which case the parties received a detailed written decision within a few weeks. Most commentators favour an immediate decision because it saves time and relieves the anxiety of the parties.³⁸⁸ While most reserved decisions were attributed to the complexity of the case, reserving a decision is also useful if the Magistrate thinks the judgment would lead to violent or disruptive behaviour in the hearing room.³⁸⁹ This is an important consideration in Small Claims cases where the Magistrate is sitting alone with the parties and without ready access to security. Given the demand on the Magistrate's time and heavy case load, the surprise was how frequently written decisions were provided. However, given also the goal of Small Claims is to avoid delay, it is important that reserved decisions be rendered within a short period of time.³⁹⁰

The disputants who stated the Magistrate/Commissioner made a decision as to the outcome of the hearing, were asked whether the Magistrate/Commissioner gave reasons for his decision. Almost three quarters of claimants and two thirds of respondents stated unequivocally that the Magistrate gave reasons for his decision, while another 13% of claimants and 24% of respondents stated that

³⁸⁶ Weller and Ruhnka, *op. cit.* 8; See also Gould, *op. cit.* 6 (1972) at 148; P. R. Verkuil, 'Crosscurrents in Anglo-American Administrative Law' (1986) 27 *William and Mary Law Review* 685, 702; D. Hewitt, *Natural Justice* (19762) (Sydney, Butterworths) cf D. J. Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (1986) (Oxford, Clarendon Press) 270; G. A. Flick, *Natural Justice: Principles and Practical Application* (2nd edn) ((1984) (Sydney, Butterworths) (common law natural justice never required that reasons be given for a decision).

³⁸⁷ DeJong, *Small Claims Court Reform op. cit.* 15.

³⁸⁸ *Ibid.*

³⁸⁹ *Ibid.*

³⁹⁰ No complaints were received from any disputant regarding an undue wait to receive a written decision from the Magistrate.

reasons were given at least 'partially' (Table 75).³⁹¹ Also, many of those saying no decision was given did not win their case, thus in many cases this meant no explanation with which the claimant was satisfied was given. This again points to the need for verbal 'sign-posting' so that disputants know what to expect and at what stage in the proceeding they are at any particular point.

Table 75: Whether or Not Magistrate/Commissioner Gave Reasons for His Decision

Response	CLAIMANTS		RESPONDENTS	
	Freq	%	Freq	%
Yes	142	74.7%	77	64.7%
No	21	11.1%	13	10.9%
Partially	25	13.2%	29	24.4%
Don't know	2	1.0%		

- Notes
- 1. No response: 32 claimants; 26 respondents
 - 2. However some of these may be cases in which an agreement was reached during the hearing

From the observed cases, it is was easy to appreciate the educational role which can be played by the decision. Sources of additional information such as a statute or particular case might also be referred to. Finally, parties need to understand the role of burden of proof and other legal doctrines which may be relevant so that they do not feel the judge is attacking their personal integrity.³⁹²

Though not required by statute to give reasons for their decisions, all Magistrates indicated that they did so. Mr Hill:³⁹³

I always made it a point of saying the claimant wins because of 1, 2, 3. It's difficult to look someone in the eye from a distance of 6 feet and say you don't

³⁹¹ NZ Study, at 45 (77% of claimants, but only 57% of respondents stated referee gave a reason for decision, with another 13% of claimants and 22% of respondents stating that the referee partially gave reasons for the decision); deVaus, at 74, 79% of claimants stated they recalled the referee making a decision.

³⁹² The writer was particularly impressed with the care and time taken by one Magistrate to explain to a losing disputant that he should not in any way feel that his integrity was under attack. It was just that one version of the motor vehicle accident was as creditable as the other.

³⁹³ Personal Communication with Magistrate Hill, as noted above, Summary of Interviews, *op. cit.* s 3.

believe what they say, but you have to do it because they have to know at the end of the day why they have to pay the \$500 or whatever. If I thought things would get very heated, I would reserve the judgment and send it in writing the following day.

Mr Hemming:³⁹⁴

I am clearly of the view that it would be folly to merely say, "claim upheld- respondent pay \$500 to claimant" because that really makes a mockery of what it's all about and because you have encouraged the parties to feel relaxed to the extent that they can tell you their problems and even in the hearing you have paid scant attention to the law relating to, say hearsay, because you want to get to the bottom of the matter. It is in fact unfair to the parties at the time of decision to just cut them off. So, I am at pains to say to them, ' Well, my view about this matter is as follows:' I will then summarise the evidence and, as best I can, explain to them why I am finding for one party rather than the other.

Most reasons for decision are presented to the parties immediately; however both Mr Hill and Hemming indicated that they reserved the matter for judgment in approximately 5-6% of the cases.³⁹⁵

6.9.3 Explanation for Reasons

Disputants who stated the Magistrate gave reasons for their decision were asked to rate how well these reasons were explained. As seen in Table 76, 82% of claimants and 71% of respondents indicated that the Magistrate explained the reasons for the decision either 'very well' or 'quite well'.³⁹⁶

³⁹⁴ *Ibid.*

³⁹⁵ *Ibid.*

³⁹⁶ NZ Study, (89% of claimants and 77% of respondents stated that the referee explained reasons for coming to decision either 'well' or 'very well') at 46; deVaus at 74 (when

Table 76: How Well the Magistrate/Commissioner Explained the Reasons for the Decision

Response	CLAIMANTS		RESPONDENTS	
	Freq	%	Freq	%
Very well	83	47.2%	36	32.7%
Quite well	61	34.7%	42	38.2%
Not very well	24	13.6%	18	16.4%
Not at all well	8	4.5%	14	12.7%

Notes

- 1. Base: disputants who stated the Magistrate gave reasons (including partially) for his decision
- 2. No response: 46 claimants; 35 respondents

6.9.4 Disputants' Perception of the Outcome

Disputants were asked in whose favour was the outcome of the hearing. Noticeable differences exist in the answers to this question and the file survey evidence which lists simply whether a judgment order of any kind or amount was awarded to the claimant. According to the file survey evidence, the claimant recovers some amount in the vast majority of cases [90% received at least half of the amount claimed, over 70% of claimants received at least three fourths of the amount claimed and half the claimants received all they asked for (Table 81)]; yet, only 59% of the claimants considered that the decision was in their favour. A number of possible explanations for this difference stem from the fact that because the full amount of the claim was not allowed, a claimant (or respondent with a counterclaim) may not regard the agreement/decision as being in their favour. For this reason, studies which report only who won or lost are misleading. A claimant, convinced that he/she is 100% in the right, but who recovers only 50% of the claim may appear to be the victor on the Court record, but will regard the case as lost. Conversely, a respondent expecting to pay 80% of the claim, but who is ordered to pay 50%, appears to lose on the record, but personally may consider that the decision was in the respondent's favour.³⁹⁷

people could recall the decision 89% stated it was clear; again this was closely related to the outcome of the case; 79% of those who found the explanation unclear lost their case).

³⁹⁷ In the NZ Study, at 79, 76% of claimants and 26% of respondents stated that the order was in their favour.

Table 77: Was Final Order (after rehearings) in Your Favour?

	CLAIMANT		RESPONDENT	
Response	Freq	%	Freq	%
In your favour	109	59.0%	44	35.5%
Not in your favour	43	23.2%	80	64.5%
Partial	33	17.8%		

- Notes
1. Base: disputants with a Court order
 2. No response/no information: 37 claimants; 21 respondents
 3. Note almost identical response to q. 31 claimants.

6.9.5 Type of Order in Favour

Disputants who stated the order was in their favour were asked to indicate the type of order. As expected, most orders involved the payment of money.

Table 78: Type of Order in Favour of Disputant

	CLAIMANT		RESPONDENT	
Response	Freq	%	Freq	%
Payment to be made by you	149	86.6%	16	31.4%
Goods to be supplied	3	1.6%	2	3.9%
Work to be done	2	1.2%	2	3.9%
Declaration	2	1.2%	12	23.5%
Reduction in amt you owed	8	4.7%	15	29.4%
Other	8	4.7%	6	11.8%

- Notes
1. Base: disputants with an order in their favour
 2. No response/information: 15 claimants; 94 respondents (includes those cases in which order was not in their favour)

6.9.6 Perceived Fairness of Outcome

Disputants were asked: 'Looking back, how fair was the agreement/decision?'. Almost three-quarters (73%) of claimants, but less than half (47%) of respondents considered the outcome of the hearing as fair.³⁹⁸ This is not too

³⁹⁸ NZ Study, at 48 (73% of claimants and 55% of respondents said the outcome was fair).

surprising given the fact that one would expect that a party who lost a decision would regard the outcome as 'unfair' and that claimants were awarded at least some of their claim in almost two-thirds of cases.³⁹⁹

Table 79: How Fair was the Outcome (Agreement/Decision)?

Response	CLAIMANT		RESPONDENTS	
	Freq	%	Freq	%
Very fair	95	46.6%	28	21.1%
Quite fair	53	26.0%	34	25.8%
Not very fair	29	14.2%	29	22.0%
Not at all fair	27	13.2%	41	31.1%

Notes

- 1. Base: all claimants attending hearing
- 2. No response: 18 claimants; 13 respondents

Note that these figures correspond with the percentages in Table 77. In other words, if the outcome was in your favour you were more likely to consider that the outcome was fair.

6.9.7 Result of the Hearing

Amount of Award

The outcome of most Small Claims cases is a monetary award. The average amount of award was \$672 with a standard deviation either way of \$532. Again, the fact that claimants often may not have recovered all they asked explains why the Court record make reflect 'judgment for the claimant', but the claimant considers the result as less than a victory.

³⁹⁹ NZ Study, at 49 (in those cases where both attended the hearing and answered the questionnaire, in 29% of the cases both regarded the outcome as fair and in 6% of the cases both stated the outcome was unfair).

Table 80: Amount of Award

DOLLARS	Freq	%	cum %
0-100	34	6%	6%
101-200	76	14%	20%
201-300	64	12%	32%
301-400	49	9%	41%
401-500	55	10%	51%
501-600	36	7%	58%
601-700	32	6%	64%
701-800	24	4%	68%
801-900	20	4%	72%
901-1000	24	4%	76%
1001-1100	17	3%	80%
1101-1200	10	2%	81%
1201-1300	9	2%	83%
1301-1400	18	3%	86%
1401-1500	22	4%	90%
1501-1600	6	1%	92%
1601-1700	5	1%	92%
1701-1800	6	1%	94%
1801-1900	9	2%	95%
1901-2000	24	4%	100%
Total	540	TOTAL	

Median= 497
 St Dev=532
 Mean=667

- Notes:
1. Other types of relief granted, eg specific performance, return of goods=31
 2. unknown (case settled) =388
 3. Missing files= 42

Award as a Percentage of the Amount Claimed

On first appearance, the Tasmanian Small Claims Court seems to be a 'claimants' Court' as demonstrated by the fact that 90% received at least half of the amount claimed, over 70% of claimants received at least three fourths of the amount claimed and half the claimants received all they asked for and (Table 81).⁴⁰⁰ However, an examination of the amount claimed as a percentage of the

⁴⁰⁰ DeVaus, at 107-108, (80% of claimants received something from the hearing; 44% got all they asked for; 36% received part and 20% received nothing. DeVaus ,at 111, also found that the greater the amount of the claim the less likely it was that the claimant would recover all the claim; also, of those who withdrew, 80% did so because the trader gave them all they asked for. Thus overall, 53% got what they asked for; 17% received nothing).

amount awarded was in many cases unsatisfactory. This was because many claims involved not money, but the return of property, declaration of rights etc. Also, because of the informal nature of Small Claims proceedings, it is possible to amend one's claim on the spot in the middle of a hearing, thus a disputant can be awarded more than the amount shown on the claim form. Because there was considerable variation in the amount awarded the decision was taken to simply identify the percent awarded as being less than the amount requested or equal to or exceeding it. This result showed that 60% of claimants received less than they asked for while 40% received all or more.

Table 81: Award as a Percentage of Amount Claimed

Award as % of claim	Freq	%
<u>< 50%</u>	<u>53</u>	<u>10.1%</u>
<u>50-74%</u>	<u>96</u>	<u>18.3%</u>
<u>75-99%</u>	<u>66</u>	<u>12.6%</u>
<u>FULL</u>	<u>309</u>	<u>59.0%</u>
<u>TOTAL</u>	<u>524</u>	<u>100.0%</u>

Percentage of Award Recovered Related to other Variables

As expected, those claimants who received all or more than they claimed were more likely to be satisfied with the result and to find it favourable. However, 20% of those who obtained at least 100% of the amount claimed recorded a negative answer when asked if they were satisfied with the result. One explanation is that the disputant was unhappy about having to go to Court at all in order to recover. Another explanation is that while the parties recovered what they asked for, perhaps they were unhappy with some other feature of the system as a whole, for example delay, problems of enforcement, inconvenience of the hearing, etc.

The variable most closely associated with the percent awarded is the type of case. The relative nature of the percentages are as follows:

- motor vehicle cases 58% awarded at least 100%
- landlord/tenant cases: 29% awarded at least 100%
- contract cases- 28% awarded at least 100%
- detinue cases: 20% awarded at least 100%.

It must be noted however that the number of detainee and landlord/tenant cases is small. Also, motor vehicle cases by their nature tend to be more 'black and white' in that one party is more likely to be clearly in the wrong. In contrast the other types of claims often involve longer and more relationships in which the facts, the law and personalities are more likely to be quite complex.

Other variables were not significantly related to the amount awarded as a percentage of the claim: lawyers seen beforehand, convenience, type of outcome, type of decision preferred, whether hearing perceived as private enough and formal enough, etc.

6.9.8 Summary

As expected the vast majority (90%) of those disputants attending a hearing stated that the Magistrate made a decision as opposed to the parties reaching an agreement.

Almost all (90%) of the disputants felt that the Magistrate had given complete or partial reasons for his decision.

Respondents were less likely than claimants to say the Magistrate gave reasons for the decision and more likely to say the Magistrate only partially gave reasons for the decision.

Many of those who stated the Magistrate gave no reasons lost their case, thus suggesting they felt no reasons were given with which they were satisfied.

The overwhelming majority of disputants (82% of claimants and 71% of respondents) that the Magistrate explained the reasons for the decision either 'very well' or 'quite well'.

Indicating the compromise outcome of many disputes, 23% of claimants and 25% of respondents considered the outcome was 'in part' in their favour.

Almost three quarters of claimants (73%), but less than half (47%) of respondents considered the outcome of the hearing to be fair.

The outcome of most Small Claims cases is a monetary award. The average amount of award was \$672 with a standard deviation of \$532.

Whether the Tasmanian Small Claims Court favours claimants over respondents is unclear. In crude general terms, 90% of claimants received at least half of the amount claimed, over 70% of claimants received at least three fourths of the amount claimed and half the claimants received all they asked for. Motor vehicle accident cases constituted the type of case most likely to result in claimants receiving all they asked for.

Those claimants who received all or more than they claimed were more likely to be satisfied with the result and to find it favourable. However, 20% of those who obtained at least 100% of the amount claimed recorded a negative answer when asked if they were satisfied with the result. One explanation is that the disputant was unhappy about having to go to Court at all in order to recover. Another explanation is that while the parties recovered what they asked for, perhaps they were unhappy with some other feature of the system as a whole, for example delay, problems of enforcement, inconvenience of the hearing, etc. These complexities reflect the fact that disputants' experience in Small Claims Court is larger than the issue of winning or losing; the opportunity to present one's case, perceptions of fairness and related issues also play vital roles in shaping disputant perceptions of outcome.

6.10. AFTER THE HEARING: APPEALS AND ENFORCEMENT

Disputants who attended the hearing were asked a few questions to determine their knowledge of appeals and effectiveness of enforcement procedures.

6.10.1 Appeals Against the Order

A major feature of the Tasmanian Small Claims system, and of Small Claims schemes in other jurisdictions, is a limitation on rights of appeal. Effectively, there is no right of appeal on the merits.⁴⁰¹ However, a disputant, within 14 days after the making of the order, may apply to the Supreme Court for a writ on one or more of three grounds: the Court had no jurisdiction, exceeded its jurisdiction or there was a denial of natural justice.⁴⁰²

Disputants were asked whether they were aware that there is generally no right of appeal against a decision made in Small Claims Court. Significantly, 40% of the disputants stated that they did not realise they could not appeal against the order (Table 82). This is surprising in that the instructional booklet given to claimants states: 'The Magistrate's decision is final and binding on all concerned with limited provision for appeal. . .'. The fact that a significant number of disputants are, despite the language of the booklet, not 'getting the message' suggests more emphasis should be placed upon this point and that more should be done to make people aware of this important limitation in Small Claims Court proceedings.⁴⁰³ Interviews with Magistrates and Court staff,⁴⁰⁴ as opposed to

⁴⁰¹ See *Magistrates Court (Small Claims Division) Act 1989* (Tas), s 31(1) ('An order made by a magistrate sitting in the Small Claims division is final and binding on all parties to the proceeding in which the order is made. (2) An appeal does not lie from an order made by a magistrate sitting in the Small Claims division.')

⁴⁰² *Ibid.* 32 (2).

⁴⁰³ In NZ the disputant can appeal, yet only 45% of claimants and 36% of respondents realised that they could appeal against the order. NZ Study, at 74. If appeals are allowed, it can be too expensive and intrusive, especially if Court reporters are used. If instead the review Court relies solely on the Magistrate's notes, reviewing judges are likely to place undue reliance on the judge's report on the case. To overcome the cost and intrusion involved with Court reporters, Ruhnka and Weller, *op. cit.*, recommend that Small Claims Courts provide a right of appeal and that Courts make cassette tape recordings of trials. Once the appeal is over the time for appeal has elapsed the tape could then be reused. See DeJong, *op. cit.* 17-18.

⁴⁰⁴ See generally, Summary of Interviews, *op. cit.* ss 3 and 4.

litigants, revealed that they believed most disputants would know and understand there is effectively no right of appeal against a Small Claims decision. The Justice Department was concerned about a couple of complaints the Department had received related to the effective absence of any right of appeal from a Small Claims judgment.⁴⁰⁵ At the same time, the Department acknowledged the difficulty of devising a structure which would provide such a right of appeal. This difficulty stemmed largely from the fact that no pleadings are involved in Small Claims and no record of evidence is maintained. Accordingly, any appeal would have to be 'de novo' which would substantially add to the delay, formality and cost of pursuing a small claim thereby defeating a major purpose of the legislation.

Table 82: Did you Know you Could Not Appeal Against the Order?

Response	CLAIMANT		RESPONDENT	
	Freq	%	Freq	%
Yes	122	60.1%	79	59.8%
No	81	39.9%	53	40.2%

Notes

1. Base: Disputants who had a hearing
2. No response: 19 claimants; 13 respondents

6.10.2 Available Remedies

As seen in Chapter 3, s. 29(3) of the Tasmanian Act provides that the Magistrate may make the following orders: 1) an order that a party pay a sum of money; 2) a declaration that the claimant does not owe money to a person specified in the order; 3) an order requiring a party to perform work to rectify a defect in goods or deficiency in services to which the small claim proceeding relates; 4) an order dismissing the claim; 5) an order that requires a party to replace any goods to which the small claim relates; and 6) any ancillary orders as may be necessary to give effect to other orders made by the Magistrate. Importantly, the Tasmanian scheme gives the Magistrate limited equity power, something which has been recommended by commentators and previous studies.⁴⁰⁶

⁴⁰⁵ Personal communication with Mr Maloney, Justice Department, October 1991. See Summary of Interviews, *op. cit.* s 4.

⁴⁰⁶ See e.g., Gould, *op. cit.* 34-35. Joseph and Friedman, Consumer Redress Through the Small Claims Court: A Proposed Model Consumer Justice Act, (1977) 18 BCL Rev 839, at 850.

6.10.3 Collection of Judgments

After judgment is entered the winning party may institute enforcement proceedings to collect on the judgment. As in most other Court-based systems, judgments obtained in Small Claims Court are enforced according to regular civil Court procedure.⁴⁰⁷ This involves requesting the Small Claims clerk to issue a writ of execution which enables the bailiff to take possession of certain personal property of the judgment debtor. The costs associated with the execution must be paid in advance by the person requesting it, however, these costs can be added to the judgment and recovered from the judgment debtor as Court costs. The Court also has power to order that the judgment debt be paid in instalments and this is a common procedure. However, it is also time consuming and arguably open to abuse by inviting some disputants to default on their payments.⁴⁰⁸

It cannot be determined precisely whether there exists any significant problems with the execution procedure, briefly described above, because record procedures of compliance are limited.⁴⁰⁹ Compared to the simplicity of other Small Claims procedures, the enforcement of Court orders is formal, complex, and results in additional expenses and delay before the judgment moneys are received, if they are received at all. Despite potential enforcement problems being mentioned in the instructional pamphlet, several claimants nevertheless expressed surprise at not being able to recover despite winning their case.⁴¹⁰ Thus, in spite of the caveat provided in the instructional pamphlet, some Small

⁴⁰⁷ See generally, Chapter 2 of this thesis for a reference to various statutes in common law jurisdictions.

⁴⁰⁸ Iowa Study, at 515 ('In cases involving automobiles, if a judgment is not satisfied within 60 days, the Department of Motor Vehicles suspends the judgment debtor's license and registration').

⁴⁰⁹ However, note other studies have quantified this as a problem. See e.g., F. Caro, 'Small Claims Court Collection in New York City: Assessing the Impact of Reform Measures' (1984) (Institute for Social Welfare Research) 44, 49 (59% of respondents reported collecting all or some of the amount awarded by the Court; 41% had not been at all successful in collecting); Ruhnka and Weller *op. cit.* 165 (estimates of uncollected judgments range from two-thirds to three-quarters of contested trials and a quarter to a half of default judgments).

⁴¹⁰ Compare Iowa Study, at 514 (25% of those surveyed were unaware prior to filing their claims that further steps were required for enforcement. When one considers inexperienced litigants the figure rises to 48%).

Claims disputants file claims without consideration of the execution process. This points to another area in which greater Court assistance is required.

Most Magistrates⁴¹¹ who were interviewed acknowledged there were some problems in this area, but the general view was that they were minor.⁴¹² While part of the problem was attributed to the inadequacies of the system, another part related to unrealistic expectations on the part of claimants who failed to realise that in many cases the inherent problem of collecting on a judgment is not a legal one, but a lack of financial resources on the part of the losing party. Again, better education and counselling of disputants is warranted.

Amongst Court staff, opinions on the issue of enforcement vary.⁴¹³ Some staff stated that they did not believe there was any significant problem in this area. For example, the Court registry noted that enforcement would only be sought in approximately 4% of cases.⁴¹⁴ This contrasts with approximately a 60% default rate in the Court of Requests. Perhaps the distinguishing feature is that in the Court of Requests, lawyers generally appear for the parties. If a party must appear, as happens in Small Claims, to present their own case, perhaps they take the matter more seriously and feel more obligated to pay the Court's order. In the Court of Requests, disputants do not expect to have to do anything until enforcement proceedings are instituted against them.

Other Court staff⁴¹⁵ acknowledged there had been some complaints and that there was no information about what percentage of cases had utilised enforcement procedures and how effective such procedures were. The former Small Claims registrar observed that disputants were now more aware of enforcement problems.⁴¹⁶ The brochure received by all disputants points out

⁴¹¹ See e.g., Interview with Magistrate Hemming, Summary of Interviews, *op. cit.* s 3.

⁴¹² Iowa Study, at 504 (94% of judges interviewed said it was a problem, the majority stating it was a moderate or serious problem, and a few indicating it was the most serious problem faced by Small Claims).

⁴¹³ See generally, Summary of Interviews, *op. cit.* s 3.

⁴¹⁴ Personal communication (on numerous occasions) with Mr Huxtable, Registrar, Small Claims (Hobart). See Summary of Interviews, *op. cit.* s 4.

⁴¹⁵ See generally, Summary of Interviews, *op. cit.*

⁴¹⁶ Personal communication (on numerous occasions) with Mr Barry Hamilton, former Registrar of Small Claims in Hobart, Summary of Interviews, *op. cit.* s 4.

that getting a favourable decision and enforcing the Court order are two distinct matters. Further information is given at the time of judgment. As explained by the former Registrar:⁴¹⁷

[F]irstly we explain the types of enforcement they have which are really the garnishees and warrants. We won't make a decision as to what should be done. We leave that to them [the litigants]. They have to take responsibility for their own decisions. We tell them the good, bad and the ugly of the enforcement up front now.

Supporting groups such as Consumer Affairs and Hobart Community Legal Service, while admitting that they had no statistics regarding enforcement, were nevertheless more inclined to see enforcement as problematic. For example, Mr Marron⁴¹⁸ thought that many disputants were uninformed about the enforcement aspects of Small Claims.

I think most people literally think the judge shakes the respondent, turns them upside down and the money falls out. Many have no concept whatsoever of recovery. This is especially so for clients with little education. I don't know what the actual figure is but the recovery rate on judgments has to be pretty low.

Q What about garnishment?

A Yes, it's good when available, but it has problems in the case of contractors, self-employed people etc. And of course, the judgment debtor can appeal against an order on the grounds of creating undue hardship etc.

⁴¹⁷ *Ibid.*

⁴¹⁸ Personal communication on 23, July 1990, See Summary of Interviews, *op. cit.* s 5.

Apart from the anecdotal data of a few individuals to the contrary, the survey data from disputants suggests that enforcement is not a major problem in Tasmania. Those disputants who obtained an order in their favour were asked whether the order was carried out. Over two thirds (70%) of claimants stated the order had been carried out in full and an additional 14% stated it had been carried out in part (Table 83).⁴¹⁹ Those disputants who had an order in their favour were asked whether they had taken any steps to enforce payment. Approximately a third of the claimants had taken enforcement steps.⁴²⁰

Table 83: Whether Order in Disputant's Favour Has Been Complied With

Response	CLAIMANTS		RESPONDENT	
	Freq	%	Freq	%
In full	116	69.5%	45	90%
In part	24	14.3%	4	8.0%
Not at all	27	16.2%	1	2.0%

Notes
1. No information/response; or claim dismissed: 41 claimants; 95 respondents (includes those in which order is against)

Those disputants in cases where the order had been carried out in full were asked to indicate the length of time between the order and receiving full payment. Payment was received within 28 days by 59% of the claimants (Table 84) and 75% of respondents (Table 85). However, the number of respondents answering these questions was small and percentages could therefore be misleading.⁴²¹

⁴¹⁹ NZ Study, at 82 (71% of claimants stated the order had been carried out in full and 12% in part).
⁴²⁰ Similarly in the NZ Study, at 84, 34% of claimants had taken enforcement steps.
⁴²¹ NZ Study, at 83 (This compares to 55% of claimants and 46% of respondents in the who received payment within 28 days).

**Table 84: CLAIMANTS: Length of Time from Order to Full
Payment/Satisfaction of Order**

Response	Freq	%	Cum %
Up to 7 days	16	12.6%	12.6%
7-14 days	22	17.3%	29.9%
14-21 days	16	12.6%	42.5%
21-28 days	21	16.5%	59.1%
4-6 wks	10	7.9%	66.9%
6-8 wks	11	8.7%	75.6%
Over 8wks	29	22.8%	98.4%
Don't know	2	1.6%	100.0%

Notes

1. Base: disputants with an order in their favour which was carried out in full
Note that the order to pay is usually between 14 to 30 days to pay.⁴²²

Table 85: RESPONDENT: Length of Time to Receive Full Payment

Response	Freq	%	cum %
Up to 7 days	8	28.6%	28.6%
7-14 days	4	14.3%	42.9%
14-21 days	4	14.3%	57.1%
21-28 days	5	17.9%	75.0%
4-6 wks	2	7.1%	82.1%
6-8 wks	1	3.6%	85.7%
Over 8wks	4	14.3%	100.0%

Notes

1. Respondents(No response/information; order not in their favour: 117)

Table 86: Have you taken any steps to enforce payment?

Response	CLAIMANTS		RESPONDENTS	
	Freq	%	Freq	%
Yes	42	31.3%	5	16.7%
No	92	68.7%	25	83.3%

Notes

1. Base: claimants with an order in their favour
2. No response/information: 51 claimants

⁴²² Response of Paul Huxtable and Magistrate Hemming to Preliminary Report.

Further, those disputants, who had not yet taken steps to enforce payment or had not been paid in full, were asked to state why they had not taken steps to enforce payment. Among the reasons given for not taking enforcement steps were:

Table 87: Reason No Enforcement Steps Taken

Response	Freq
Sent letters to no avail	1
Still within time	3
Waste of time & money	2
Amount too small re cost of enforcement	4
M gave extra time	1
R disappeared	3
Too much hassle	1
Insurance Co looking after	3
Ins Co taking steps	1
Bailiff said took all valuable	1

Responses were obtained from only 3 Respondents. One indicated that enforcement would be a 'waste of time and money'; another said it was 'too much hassle', and the third respondent 'didn't think it was necessary'.

Looking at enforcement from the viewpoint of the losing party, those disputants who stated the order was not in their favour were asked to indicate the type of order.

Table 88: Claimants: Type of Order Not in Favour

Response	Freq	%
Paym't to be made by you	12	29.3%
Goods to be supplied	1	2.4%
Work to be done	14	34.1%
Claim dis'miss'd, no jurisd	13	31.7%
Other	1	2.4%

- Note
1. Base: disputant with order not in their favour
 2. It is possible that an order was partly in one's favour and partly against

Table 89: Respondents: Type of Order Not in Favour

Response	Freq	%
Paym't to be made by you	79	80.7%
Goods to be supplied	3	3.1%
Work to be done	2	2.0%
Claim dis'miss'd, no jurisd	6	6.1%
Other	7	7.1%
Don't know	1	1.0%

- Notes
- 1. small numbers can make percentages misleading
 - 2. Respondents No response or order in favour: 47

These disputants were asked to indicate whether they had complied with the order, in full, in part or not at all.

Table 90: Whether the Disputant Has Complied with the Order

Response	CLAIMANTS		RESPONDENTS	
	Freq	%	Freq	%
In full	21	91.4%	72	86.7%
In part	1	4.3%	7	8.4%
Not at all	1	4.3%	4	4.8%

- Notes
- 1. Base: claimants with an order not in their favour
 - 2. small numbers; therefore caution urged
 - 3. No response: 18 respondents

The vast majority of the respondents (87%) and 91% of claimants who stated that the order was not in their favour indicated that they had complied with the order in full.⁴²³

Those disputants who had carried out the order only partially or not at all were asked to indicate why they had not fully complied. Of the twelve who responded, half said they were still paying on the order. Three stated that the claimant had dropped the matter. One stated he was waiting for an official demand. Perhaps this means a second demand because Paul Huxtable points out that a copy of the Magistrates Order is sent out. Another stated that he

⁴²³ NZ Study, at 87 (77% of respondents complied in full and another 10% in part); deVaus, at 108.

disagreed with the judgment. Finally, another stated that he assumed the insurance company had paid.

Disputants subject to an order against them were asked whether any Court enforcement procedures had been taken out against them. Obviously there were many cases in which enforcement orders were taken out, but the respondent was not aware of this.⁴²⁴

Table 91 Have any Court Enforcement Procedures Been Taken Out Against You?

Response	CLAIMANTS		RESPONDENTS	
	Freq	%	Freq	%
Yes	1	2.4%	5	5.4%
No	41	97.6%	87	94.6%

Note
1. Base: disputants with an order against them and who haven't paid
2. Respondents: No response/information: 9

6.10.4 Enforcement of Settlement Agreements

Whether mediation produces greater compliance than adjudication is still open to question.⁴²⁵ Regrettably, the poor response from those whose case had settled did not enable a conclusion to be drawn on the issue in the present study. Proponents of mediation argue that it is more likely than adjudication to get at the root of a problem. Thus mediators are trained to seek to understand why something happened as much as what happened.⁴²⁶ However, in practice, the extent to which this occurs is questionable. Mediation appears especially inappropriate to multi-party disputes. It is also argued that mediation in effect teaches those without power to accept the structural inequalities which exist in society. It does not overcome them; it does not get at the root sociological and psychological causes of disputes.⁴²⁷ Indeed by privatising the conflict, giving

⁴²⁴ NZ Study, at 89, reported a similar finding.

⁴²⁵ McEwen and Maiman *op. cit.* 11-49 (found that settlement produced greater compliance than adjudication).

⁴²⁶ See McEwen and Maiman, *op. cit.* 11-49; N. Vidmar, Research Note: Assessing the Effects of Case Characteristics and Settlement Forum on Dispute and Outcome Compliance, (1984) 18 *Law and Society Review* 155-164; Cf M. Borrelli, *op. cit.* 299.

⁴²⁷ See generally, R. Abel, *The Politics of Informal Justice, Volume I: the American Experience* (New York, Academic Press).

the party the opinion that the dispute can be resolved individually, the dispute belongs to the individual to work out. The result of this privatisation of conflict is that the individual is blamed for what otherwise may be societal, structural problems.⁴²⁸ As Singer noted:

[T]he need for a collective response or policy transformation cannot be achieved through individualised dispute resolution. . . the political dimension of these injustices is excluded when translated into a misunderstanding resolvable by negotiation and the avoidance of conflict.⁴²⁹

6.10.5 Summary

Close to half (40%) of the disputants stated that they did not realise they could not appeal against the order. This suggests the need for greater public education regarding this aspect of Small Claims.

Most (59%) claimants who received an order from the Court considered that it was in their favour. Correspondingly, 35% of the respondents considered the order was in their favour.

The majority of orders in the claimant's favour (87%) was a payment to be made to them, whereas for respondents, approximately a third of the orders were payments to be made by them, declarations of rights and reductions in the amount they owed.

Of the claimants who had an order issued in their favour, 70% reported that the order had been complied with in full and another 14% stated that the order had been complied with in part. Of those claimants who had received payment in full 59% had received the amount within 28 days and 67% had received full payment within 4-6 weeks.

⁴²⁸ *Ibid.*

⁴²⁹ Singer, *op. cit.* 576.

Approximately one third (31%) of claimants stated that they had taken steps to enforce payment of the order in their favour.

Of the respondents who had an order against them 87% stated that they had paid in full and an additional 8% stated they had paid in part. This would suggest that enforcement of orders is not a major problem in Tasmania. However, given the importance of enforcement, it is crucial that more accurate information be kept regarding the enforcement of Small Claim orders.

In conclusion, despite some contrary views and unlike some jurisdictions,⁴³⁰ there does not appear to be a major problem in judgment collection. Indeed, the disputant survey revealed that 70% of the claimants and 90% of the respondents said that the order had been complied with in full. Although the execution procedure does not always work, most litigants probably do better with it than without.⁴³¹

It also seems clear, however, that the effectiveness of collection procedures needs to be monitored carefully⁴³² lest the Small Claims Court be seen as granting only 'hollow victories'.⁴³³ Regrettably, moneys paid pursuant to a Court order are not presently paid into Court. Accordingly, when a judgment has been paid, for example under an instalment agreement, few plaintiffs inform the Court that the judgment has in fact been paid.⁴³⁴ While on the one hand,

⁴³⁰ Iowa Study, at 51 ('A majority of plaintiffs had difficulties with collection, and a high percentage indicated they did not receive any payments on their judgments.'). See also F. Caro, Institute for Social Welfare Research, *Small Claims Court Collection in New York city: Assessing the Impact of Reform Measures*, (1984) at 52 (59% of litigants reported collecting all or some of the amount awarded; 41% had not been successful at all). Ruhnka and Weller, *op. cit.* 165, found collection in 84% of the cases and in 25% of default cases.

⁴³¹ Iowa Study, at 517 (For example in Iowa those litigants utilising execution 37% received all the judgment; 18% received some; and 45% received none. Where no execution was attempted 24% received all, 5% received some and 71% received none).

⁴³² Borrelli, *op. cit.* 279 also reported problem with record keeping in this area.

⁴³³ It would for example be interesting to know how long winning parties must wait between the time of execution and the time parties actually receive their money. See e.g. Iowa Study, at 518 (Average length of time was 106 days).

⁴³⁴ This has been a common finding in most Small Claims studies. For example, F. Caro, Institute for Social Welfare Research, *Small Claims Court Collection in New York city: Assessing the Impact of Reform Measures*, (1984) at 44 (only 14 cases in the New York City sample had satisfaction of judgment recorded).

this saves administration time, it also it makes extremely difficult for the Court to assess the effectiveness of its enforcement procedures.⁴³⁵ Parties require assistance in the collection process and need forewarning of its difficulty. Armed with such knowledge the potential disputant is better able to make an informed decision regarding the efficacy of initiating a small claim.⁴³⁶

⁴³⁵ Contrast the Iowa system in which judgment creditors must notify the Court of payment. Indeed, a judgment debtor who pays the obligation and the judgment creditor does not file a record of satisfaction can recover a \$100 penalty from the judgment creditor.

⁴³⁶ F. Caro *op. cit.* 6 (Courts should explain to consumers the role which the Court can play in strengthening their collection efforts.).

6.11 THE DISPUTANTS

6.11.1 Previous Involvement with Small Claims Courts and the Court of Requests

The number of repeat users (those who had been to Small Claims either as a claimant or respondent, was as expected (Table 92) and compares favourably with other studies.⁴³⁶

Table 92: Number of First-time vs Multiple Users of Small Claims and Court of Requests

Response	CLAIMANTS		RESPONDENTS	
	Freq	%	Freq	%
Single	142	68.9%	77	58.8%
Multiple	64	31.1%	55	42.0%

- Notes
- 1. Single: First time in Small Claims/Ct of Requests
 - 2. Multiple: Been Small Claims/Court of Requests previously
 - 3. No response/information: 16 Claimants; 14 respondents

A number of potential problems are raised in the case of these 'repeat players' vis-a-vis those disputants who are appearing in Small Claims for the first time ('one-shotters').⁴³⁷ For example, some writers⁴³⁸ have classified parties as 'repeat players' or 'one-shotters' and sought to explain disparities of outcomes in the litigation process in terms of the superior knowledge, experience and resources of the 'repeat players'. Superiority in these areas enables 'repeat players' to afford highly competent lawyer and experts necessary to conduct litigation, but more particularly it allows them to engage in procedural delay strategies, permitted by the formal procedures and practices for the conduct of the litigation, which can force the poorer litigant (typically a one-shotter) to accept an inadequate settlement offer or even to abandon the litigation altogether.⁴³⁹

⁴³⁶ But see Iowa Study *op. cit.* 466 (found that 79% of the plaintiffs had been in Small Claims before. In part this rather high number of repeat users could be overstated in view of the low 31% overall response rate). In the NZ Study, at 109, 37% of the claimants had appeared in a tribunal more than once and 27% of the respondents were repeat users.

⁴³⁷ M. Galanter, 'Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change' (1974) 8 *Law and Society Review* 97.

⁴³⁸ See e.g., *ibid.*

⁴³⁹ M. Franaszek, 'Justice and the Reduction of Litigation Cost: A Different Perspective' (1985) 37 *Rutgers Law Review* 337.

Notwithstanding the danger of repeat users who might manipulate the system to their advantage, there was no evidence (qualitative or quantitative)⁴⁴⁰ that such repeat users constitute a problem in the Tasmanian Small Claims Court. I would suggest at least two reasons for this. First, in a small community, such as Burnie or Devonport, and even Hobart, unduly offensive or aggressive tactics which might advantage a repeat user are obvious and the person becomes well known and watched for. Secondly, the Small Claims Magistrates, especially the full-time Magistrate, Mr Hemming, showed themselves to be extremely alert to the abuse of the system by one party (such as a repeat user) at the expense of the other. Thus, delay tactics, coercive settlement pressures, etc were not tolerated. Indeed, Mr Hemming⁴⁴¹ has used his 'influence' to discourage experienced insurance agents and other parties from unfairly taking advantage of various procedural rules.⁴⁴² It is possible that repeat users could use their superior knowledge even prior to the case even being filed and thus avoid the moderating influence of the Magistrate, but there was no evidence in this study that such was the case.

6.11.2 Demographic Characteristics of Disputants

Below is a description of the demographic characteristics of those disputants who answered the survey questionnaire. It must be emphasised, however, that the data must be interpreted with caution because the responses only reflect those who answered the questionnaire. We have no way of knowing the demographic characteristics of those who did not respond to the survey, nor those who for whatever reason chose not to utilise the Small Claims Court. Moreover, even amongst those who did respond to the survey, there were significant gaps in the responses which renders suspect any significant statistical analysis. Despite all these faults, however, the user information does add to our evaluative picture of Small Claims in Tasmania. Note that where possible, the survey data is compared to Tasmanian census data to gain some indication of how representative the survey sample is of the overall population.

⁴⁴⁰ Examining repeat users and controlling for all other variables did not highlight any significant differences.

⁴⁴¹ Personal Communication on numerous occasions, see Summary of Interviews, *op. cit.* s 3.

⁴⁴² For example, the right to a rehearing.

Gender of Disputants

Women appear to be under-represented amongst Small Claims Court users; only 32% were female.⁴⁴³ However, this figure should be treated with caution because the questionnaire was not designed for husband-wife claimants. Thus, it is likely a number of disputants would have given the information for the husband only. Also, there is likely to be some cultural reluctance by women to participate in public dispute resolution mechanism where men are dominant.⁴⁴⁴ Other factors may be that men purchase more products and services; that women are more likely to settle their disputes; and more likely to be involved in the earlier stages of the proceedings.⁴⁴⁵

Table 92a: Gender of Disputants

Response	Claimants		Respondents	
	Freq	%	Freq	%
male	108	67.9%	69	67.6%
female	50	31.5%	33	32.4%
Husband/wife	1	0.6%		

Notes
1. Base: individual claimants having been through a hearing
2. No response and corporate claimants: 63; no response and corporate respondents: 43

Marital Status of Disputants

The marital status of disputants appears fairly representative of the general population. Census Data (1986) for Tasmania indicates 59.6% are now married; 7.2% separated or divorced; 6.8% widowed and 26.4% never married. Widows appear to be the main group underrepresented.⁴⁴⁶

⁴⁴³ DeVaus, at 56 found 37% were female and drew similar conclusions.
⁴⁴⁴ DeVaus at 57.
⁴⁴⁵ *Ibid.*
⁴⁴⁶ The New Zealand figures (at 112) were similar: 65% of claimants were married, defacto and 685 of respondents.

Table 93 : Marital Status of Disputants

Response	CLAIMANTS		RESPONDENTS	
	Freq	%	Freq	%
Married/de facto	102	65.0%	66	64.7%
not married	40	25.5%	22	21.6%
separated/divorced	10	6.4%	11	10.8%
widowed	5	3.1%	3	2.9%

Notes
 1. Base: individual disputants having had a hearing
 2. No response and corporate (claimants): 65 ; No response and corporate respondents: 43

Occupational Level of Disputant

The occupational levels of disputants who utilise the Tasmanian Small Claims Court suggest that upper socio-economic groups are overrepresented and lower socio-economic groups are underrepresented. As shown in Table 94, if one compares the 1986 census figures, managers/administrators (8.9% Census) and professional people (12.0% Census) are over represented, while labourers (13.9% Census), plant and machine operators (10.8% Census) are under represented.⁴⁴⁷ With the exception of the groups mentioned above, all other categories of occupations found in the survey sample were generally representative of the population as a whole, though the Small Claims Registrar⁴⁴⁸ suggests that the number of self-employed is understated.

⁴⁴⁷ DeVaus, at 50, also found that there was an over-representation of those from upper occupational categories.

⁴⁴⁸ Comments of Mr Paul Huxtable on my 1991 Preliminary Report.

Table 94: Employment Status of Disputants

	CLAIMANTS		RESPONDENTS			
Response	Freq	%	Freq	%	Total	%
Managers & administrators	24	15.4%	8	8.0%	32	12.5%
Professionals	30	19.2%	17	17.0%	47	18.4%
Para-professionals	9	5.8%	8	8.0%	17	6.6%
Tradepersons	25	16.0%	10	10.0%	35	13.7%
Clerks	12	7.7%	8	8.0%	20	7.8%
Sales personal service	6	3.8%	4	4.0%	10	3.9%
Plant & machine operators	2	1.3%	7	7.0%	9	3.5%
Labourers	8	5.1%	8	8.0%	16	6.3%
Home Duties	14	9.0%	13	13.0%	27	10.5%
Student	9	5.8%	9	9.0%	18	7%
Pension/benefits	7	4.5%	5	5.0%	12	4.7%
Old age Pension	10	6.4%	1	1.0%	11	4.3%
Self Employed			2	2.0%	2	.8%

Notes

1. Base: individual claimants attending hearing
2. No response; corporate litigants: 66; Respondents: 45

Total Family Annual Income of Disputants

Disputants were asked to indicate their estimated annual income before tax (Table 95). The 1986 Census figures for Tasmania indicate that 50% of families had an income above \$22,161. The comparative figures for the disputants surveyed are reasonably close once inflation⁴⁴⁹ is taken into account. Note that family income for respondents is higher than for claimants.

⁴⁴⁹ The Census data is three years older than the data collected in this Small Claims Survey.

Table 95: Annual Income Before Tax

Response	CLAIMANTS		RESPONDENTS	
	Freq	%	Freq	%
nil	13	7.0%	2	2.0%
1-9999	10	5.4%	9	8.9%
10000-19999	33	17.7%	13	12.9%
20000-29999	41	22.0%	10	9.9%
30000-39999	32	17.2%	12	11.9%
40000-49000	13	7.0%	6	5.9%
50000-59999	24	12.9%	17	16.8%
60000-69999	9	4.8%	10	9.9%
70000-79999	7	3.8%	10	9.9%
80000-89999	2	1.1%	7	6.9%
90000-99999	1	0.5%	4	4.0%
over 100000	1	0.5%	1	1.0%

Notes

1. Base: family income
2. No response; corporate claimants: 36; No response and corporate respondents: 443. 0-\$19999= Low income; \$20,000-\$49,999= Medium income; \$50,000+ = High income

Educational Level of Disputants

Consistent with the employment picture, the educational level of the disputants is higher one would find in the general population.⁴⁵⁰ This conclusion was also supported by the File Survey Data. For example, taking the postcodes from the file data and comparing the file data with the census data for the greater Hobart area, we find that the percentage of Small Claims disputants with a university degree or higher qualification is almost 33% higher than exists in the general Hobart population. Accordingly, the Small Claims Court appears to be more attractive to the educated, the wealthy and the articulate. While in part this merely reflects the social inequalities which exist in society generally -- factors which are largely beyond the control of the Court system itself, it also suggests that the Court should do more to promote access to the system by the uneducated, poor and inarticulate and be more sensitive to their needs.

⁴⁵⁰ This pattern is similar to that reported by deVaus, at 52.

Table 96: Highest Level of Education

Response	CLAIMANTS		RESPONDENTS	
	Freq	%	Freq	%
Completed Uni/Tech	39	25.2%	34	33.3%
Some Uni/Tech	32	20.6%	17	16.7%
Trade Certificate	25	16.1%	12	11.8%
Completed Yr 12	24	15.5%	14	13.7%
Some secondary	28	18.1%	21	20.6%
Completed primary	6	3.9%	4	3.9%
Some primary	1	0.6%		

Notes

1. Base: individual claimants who attended hearing
2. No response; corporate litigants: 67; No response and corporate respondents: 43

Information About Spouse/Partner

Non-business disputants were asked to state their spouse's/partner's occupation and estimated annual income.

Table 97: Spouse's Occupation

Response	CLAIMANTS		RESPONDENTS	
	Freq	%	Freq	%
Managers & administrators	14	12.8%	4	5.6%
Professionals	22	20.2%	23	32.4%
Para-professionals	3	2.8%	4	5.6%
Tradepersons	11	10.1%	11	15.5%
Clerks	14	12.8%	6	8.5%
Salespersons & personal service workers	5	4.7%	3	4.2%
Plant & machine operators	2	1.8%	1	1.4%
Labourers	8	7.3%	4	5.6%
Self employed	1	0.9%	1	1.4%
Student	26	23.9%	12	16.9%
Pension/benefits	2	1.8%	1	1.4%
Old age pension	1	0.9%		

Notes

1. Base: married individual claimants having been through a hearing
2. No response; corporate claimants; individual without a spouse: 113; For respondents: 74

Age of Disputants

The age level of disputants was roughly representative of the general population. According to the Tasmanian 1986 Census, 10.9% of the population are 65 years and over.

Table: 98: Age of Disputants

Response	CLAIMANTS		RESPONDENTS	
	Freq	%	Freq	%
Under 20	6	3.9%	5	5.1%
20-29	40	26.0%	19	19.4%
30-39	32	20.8%	22	22.4%
40-49	36	23.4%	23	23.5%
40-59	22	14.3%	14	14.3%
60-69	10	6.5%	11	11.2%
Over70	8	5.1%	4	4.1%

Notes

1. Base: claimants who were individuals (as opposed to businesses)
2. No information; not applicable because claimant was company, etc: 68: For respondents: 47.

Nationality of Disputants

As noted in section one, in our discussion of Small Claims access for migrants, the nationality characteristics for the disputants surveyed is fairly representative of the Tasmanian population. Census (1986) figures for Tasmania show that 88.8% of the state's population were born in Australia and 4.3% in England. For any other country the percentage is less than 1%. These figures suggest that the Court is equally accessible to migrants and native born Australians.⁴⁵¹ As a percentage of population, one would expect that potential problems with migrants would not be as significant an issue in Tasmania when compared to such states as Victoria and NSW where non-English speaking migrants are located in much greater numbers. Generally these figures suggest that migrants are being well served by the system.

⁴⁵¹ De Vaus, at 55, ('Overall the distribution of people according to country of birth was similar in the SCT sample and the 1981 census for Victoria. 69% of the SCT users were Australian born (cf. 69% in Victoria)).

Table 99: Birthplace /Nationality of Claimants

Response	Freq	%
Australia	124	80.0%
Europe	1	0.6%
UK	13	8.4%
Poland	2	1.3%
USA	1	0.6%
Croatia	1	0.6%
India	1	0.6%
Austria	2	1.3%
Scotland	1	0.6%
Germany	2	1.3%
Laos	1	0.6%
New Zealand	2	1.3%
Hungary	1	0.6%
Egypt	1	0.6%
Sth Africa	1	0.6%
Holland	1	0.6%

Notes

1. Base: individual claimants
2. No response or corporate litigants: 67

Table 100: Years in Australia:Claimants

Response	Freq	%
New Australian	2	5.0%
Old Australian	38	95.0%

Notes:

1. Base: individual claimants not born in Australia
2. Not applicable and No response: 181
3. New Australian= 3 years or less in Australia
4. Old Australian= greater than three years residence in Australia

Table 101: Birthplace /Nationality of Respondents

Birthplace	Freq	%
Australia	82	83.7%
UK	5	5.1%
Czechoslovakia	2	2.0%
Germany	2	2.0%
Holland	2	2.0%
Poland	1	1.0%
Croatia	1	1.0%
India	1	1.0%
Yugoslavia	1	1.0%
Ukraine	1	1.0%

Note that all respondents who indicated that they were born outside of Australia had resided in Australia for more than five years. Thus, there was no significant 'migrant' group amongst the respondents who utilised the Small Claims Court.

6.11.3 Summary and Conclusion

Just under one third of claimants (31%) and 42% of respondents were repeat users either of the Small Claims system or the Court of Requests. There is no evidence of any significant abuse of the system by repeat users at the expense of first-time users of the Small Claims Court.

Just over two-thirds of the disputants were male and the overwhelming majority (80% claimants; 84% respondents) of disputants were born in Australia. Most of those not born in Australia had been in Australia for more than three years. These nationality features are fairly close to the Tasmanian Population (1986) Census figures. They also suggest there is little problem in Tasmania of access to Small Claims by migrant groups.

Approximately two-thirds of disputants were married or living in a de facto relationship.

Half of the respondents and almost half (46%) of claimants had some tertiary level education; while a quarter of claimants and a third of respondents having completed university or technical college.

A comparison of the family income groupings, educational level and occupation of disputants utilising the Court with similar Tasmanian figures for the 1986 Census, suggests that those in the upper socio-economic levels are more likely to have utilised the Small Claims Court than those in the lower socio-economic level.

This section presented an overview of the characteristics of disputants who utilised the Tasmanian Small Claims Court. Given that a major goal of Small Claims Courts is to make the Courts more accessible for minor disputes, the characteristics of its users can provide an important measure of how well the system is succeeding in reaching people from all levels of society.

Conley and O'Barr point out that :

Underlying all the practical problems in the delivery of justice is a definitional one. Because of its history as an agency of the politically and economically powerful, the law has come to define the problems of ordinary people in ways that may have little meaning for them, and to offer remedies that are unresponsive to their needs as they see them.⁴⁵²

A major goal of Small Claims Courts is to empower disputants to handle their own disputes. Accordingly, the fact that upper and middle classes appear to be overrepresented in the Tasmanian Small Claims Court suggests that the Court may be too far removed from the needs and abilities of such groups. The Court, as part of the legal system may even be helping to perpetuate existing inequalities in society.⁴⁵³ On a more optimistic note, with continued education and communication between the Small Claims Court and those who utilise it, the eventual result will hopefully be that all groups in society will enjoy real and equal access to the Court system. Indeed, it has been suggested that Small Claims Courts and Tribunals may have a very positive role to play in bridging the socio-economic gaps which exist between different groups in society, for as Ison⁴⁵⁴ points out,

a larger portion of small claims involve inter-class reaction. Hence it is in the handling of small claims, rather than large ones, that the integrity of justice is tested in the processes of inter class reaction. So to the majority of the population, the handling of small claims is far more significant than the handling of larger ones in contributing to

⁴⁵² Conley and O'Barr *op. cit.* 177.

⁴⁵³ See A. Jamrozik, *Class, Inequality and the State: Social Change, Social Policy and the New Middle Class* (1991) (Melbourne, Macmillan) ('...the allocation of important areas of community services takes place in the context of conflicts of aims, values and interests. But, since some values and interests are more powerful than others the outcome also tends to benefit the more influential, affluent and powerful sections of the population/ at 110).

⁴⁵⁴ T. G. Ison, 'Small claims' (January 1972) 35 *Modern Law Review* 23-24.

the level of confidence in the administration of justice.

Finally, we must also be careful lest we blame all of society's ills on the Courts, when the reality is that the law, as an institution, is only one part of a much larger political system.⁴⁵⁵

⁴⁵⁵ See B. Moulton, 'The Persecution and Intimidation of the Low-Income Litigant as Performed by the Small Claims Court in California', (1968-69) 21 *Stanford Law Review* 1669, 1684.

6.12. OVERALL OPINION AND DISPUTANT SATISFACTION WITH SMALL CLAIMS

6.12.1 Difficulties in Measuring User Satisfaction

In analysing user satisfaction with the Small Claims Court it must be acknowledged that, while there are some factors within the control of the Court which might improve disputant satisfaction, other factors are outside the Court's control. It has been suggested that two such factors outside the Court's control are the inherent trauma of being a defendant (regardless of the outcome) and the fact of losing.⁴⁵⁵ Thus, it is natural to expect that parties will continue to feel nervous about bringing their own claim, no matter how informal the Court structure and procedure; and parties who lose their case will tend to feel less satisfied as a result of their losing. Another difficulty in measuring satisfaction amongst users is that, notwithstanding anything the Court does, prior expectations may act to shape the disputant's views. Accordingly, for some members of the public, expectations for the judicial system are so high that disillusionment results when the system is experienced first hand.⁴⁵⁶

Further insights about disputant satisfaction come from recognition of the fact that the 'rules' approach of Courts is often in conflict with the 'relationship' approach of lay disputants. Consequently, many lay people have 'expectations of the legal system that deviate greatly from what the system is prepared to deliver.'⁴⁵⁷ As noted by Conley and O'Barr,⁴⁵⁸ disputant expectations are more likely to match Small Claims Court reality thus achieving higher satisfaction when people are:

informed about the system, listened to sympathetically, and have the opportunity for unconstrained story telling. The difficulty of this is that the legal system has a history as an agency of the politically and

⁴⁵⁵ S. Weller, J. Martin, and J. C. Ruhnka, 'Litigant Satisfaction with Small Claims: Does Familiarity Breed Contempt?' (Spring 1979) *State Court Journal* 3. While approximately two thirds of plaintiffs were satisfied with their experiences, only slightly more than half of the defendants reported being satisfied.

⁴⁵⁶ *Ibid.* 3. See also, A. Sarat, 'Studying American Legal Culture, An Assessment of Survey Evidence,' (Winter 1977) *Law and Society Review* 11.

⁴⁵⁷ Conley and O'Barr (1990), *op. cit.* 176.

⁴⁵⁸ *Ibid.* 176-77.

economically powerful' . . . (and) law has come to define the problems of ordinary people in ways that may have little meaning for them, and to offer remedies that are unresponsive to their needs as they see them.

The above analysis points to the fact that discussions of user satisfaction are fraught with interpretive difficulties. While acknowledging the difficulties and dangers inherent in probing the psyche of Small Claims disputants, it is nevertheless valuable to gain some insight into the perceptions of satisfaction with the Small Claims System as viewed by those who come into contact with the system: Magistrates, Court staff, community groups, and most importantly, the disputants themselves.

6.12.2 Opinion of Magistrates and Court Staff

Without exception, all those interviewed felt that the Small Claims system was working exceptionally well and had been a major success. One aspect of that success is the Court's efficiency. Mr Hamilton,⁴⁵⁹ the first Small Claims Registrar in Tasmania, observed:

What you have to remember is that Small Claims is absorbed into a structure that was already there and it came at no cost to the community except for the cost of the Commissioner.

A number of interviewees also pointed out that the very few complaints and the fact that only one appeal writ had ever been taken to the Supreme Court was also evidence that the vast majority of people were satisfied with the system.

6.12.3 General Satisfaction Level of Small Claims Disputants

In order to obtain an overall satisfaction rating two measurers were used. First, disputants were asked to rate their satisfaction with Small Claims on a scale of 1 (very unsatisfied) to 10 (very satisfied).

⁴⁵⁹ Personal Communication with Mr Hamilton, as noted above, see Summary of Interviews, *op. cit.* s 4.

Table 102: How Satisfied Were You with Small Claims?

CLAIMANTS			RESPONDENTS		
Response	Freq	%	Response	Freq	%
1 (totally unsatisfied)	32	15.8%	1 (totally unsat)	30	22.7%
2	7	3.4%	2	8	6.1%
3	7	3.4%	3	14	10.6%
4	9	4.4%	4	4	3.0%
5	14	6.9%	5	8	6.1%
6	9	4.4%	6	14	10.6%
7	17	8.4%	7	6	4.5%
8	32	15.8%	8	15	11.4%
9	27	13.3%	9	13	9.8%
10(totally satisfied)	49	24.1%	10(totally sat.)	20	15.2%

- Notes
- 1. Base: disputants attending hearing
 - 2. No response: 18 claimants; 12 respondents
 - 3. percentage over 5: 66%

Secondly, claimants were asked: "If you had another dispute similar to this one, would you use the Small Court again?" A very strong majority of disputants (78% claimants and 69% respondents) stated that they would use Small Claims Court again (see Table 103 below).⁴⁶⁰ This is generally a very positive result, especially given the fact that only 36% of the respondents who attended the hearing considered the outcome was in their favour.⁴⁶¹ In general then, disputants were satisfied with the Court's performance, though some caution has to be exercised because satisfaction is obviously impacted by the outcome of the claim.⁴⁶²

⁴⁶⁰ NZ Study, at 91 (84% of claimants and 75% of respondents stated they would use the tribunal again); In Victoria, deVaus, at 63 (found that 78% of the claimants stated they would return to the SCT).

⁴⁶¹ DeVaus, at 63 (The majority of claimants (63%) said they were satisfied with the outcome. Claimants with larger amounts were less likely to be satisfied).

⁴⁶² Mr Hemming pointed out, one would suspect that some disputants would rate their satisfaction level as '10' or '1' depending entirely on the outcome--a conclusion perhaps supported by the fact that most disputants registered at one of these extremes when completing the satisfaction scale. While winning or losing no doubt is a factor, it is important to note that even a large percentage of 'losers' rated their experience as satisfactory. Moreover, as noted above, the majority of disputants said they would use the Court again. Personal Communication, on numerous occasions. See also De Vaus at 77, who drew a similar conclusion; NZ Study, at 92-93 (in 16% of the cases the claimant stated they would use the tribunal again and the respondent stated they would not; and in 6% of the cases the respondent stated they would use the system again, but the claimant would not. Also, 'the more positive the rating of fairness of the outcome, and the order being in the disputant's favour, the more likely the disputant is to have stated they would use the tribunal again.').

Table 103: Would Disputant Use the Small Claims Court Again?

Response	CLAIMANT		RESPONDENT	
	Freq	%	Freq	%
Yes	161	77.8%	89	68.5%
No	46	22.2%	39	30.0%
Don't know			2	1.5%

Notes

1. No response: claimants (14; don't know: 1); respondents: 15

6.12.4 Reasons for Negative Rating

Those disputants who stated they would not use the Small Claims Court again if they had a similar dispute, were asked to give their reasons.

Table 104: Claimants' Reasons for Not Using Small Claims Court Again

Response	Freq	%
Waste of time/money	12	21.9%
Poor Enforcement	11	20.0%
Mag prejudiced/bad attitude/unfair	7	12.7%
Magistrate not qualified	4	7.3%
Too much compromise	4	7.3%
Inadequate procedures	3	5.5%
Not a fair system, no faith in the system	3	5.5%
Justice not done/incorrect decision	2	3.6%
Want legal argument/representation	2	3.6%
Delays	2	3.6%
System protects unscrupulous people	1	1.8%
Ignorant staff/problems with staff	1	1.8%
No formal rules of evidence (see 9)	1	1.8%
No right of appeal	1	1.8%
Inconvenient	1	1.8%
	55	

Notes

- 1. Base: Claimants who said they would not use Small Claims again
- 2. Among the procedures complained about were: insufficient rules of evidence, no witnesses etc) too rushed, felt intimidated, didn't like confrontation with other party.

Table 105: Why Respondents Said They Would Not Use Small Claims Again

Response	Freq	%
Mag prejudiced/bad attitude/unfair	12	23.1%
Justice not done/incorrect decision	8	15.4%
Inadequate procedures	7	13.5%
System protects unscrupulous people	5	9.6%
Want legal argument/representation	5	9.6%
Enforcement	4	7.7%
Mag not qualified	3	5.8%
Waste of time/money	3	5.8%
Unsuited to uneducated	2	3.8%
Too much compromise	1	1.9%
Do it more self	1	1.9%
Wont happen again	1	1.9%

- Notes
- 1. Base: respondents who would not use Small Claims again
 - 2. 'Inadeq proced'=insufficient rules of evidence, no witnesses etc) too rushed, felt intimidated, didn't like confrontation with other party (see 24)

The small numbers in each category obviously demand caution. However, it should be noted that much of the negative response appear to be attributable to two main sources: 1) either a party's unhappiness at their failure to win; or, 2) their failure to collect on the judgment. Other factors, such as helpfulness of staff, no right of appeal, no lawyer etc appear far less significant.

6.12.5 Variants of Satisfaction

Methodology

To obtain an overview of success or failure of the Small Claims Court the researcher divided the data into two major groupings: the cases in which data were available for both claimants and respondents in the same case ('matched data') and those cases in which only one party, either claimant or respondent, returned the questionnaire ('unmatched').

The matched data are important because one is able to obtain the views of claimants and respondents who were involved in the same context and thus can control for such obvious variables as winning and losing. However, the unmatched data are also important from the standpoint that the cases are all independent of each other. In contrast the matched pairs interact with one another and it is thus difficult to discern interaction effects from independent effects.

Reducing response categories

Also for purposes of analysis, in questions for which there are ordered responses, I have collapsed response categories into either positive and negative categories or positive - neutral - negative categories. While such a procedure loses some detail, such a loss is more than compensated by the simpler form of presentation of results.

Personal characteristics

There is much missing data regarding personal characteristics. This in part is because some cases involve businesses rather than individuals. In other cases, people are reluctant to release personal details for a variety of reasons. Consistent with other studies, however, it appeared that the more wealthy and better educated disputants fared better and were more satisfied with the Small Claims Court.

Success and failure

Because of the unworkability of considering a hundred different variables from the data, I chose five variables which most clearly reflect the view that the result of the Small Claims Hearing was, for those litigants, successful. These variables were:

1. Were you satisfied with the result (scored greater than 5 on the satisfaction scale (1-10))
2. Whether the disputant stated they would use the Small Claims Court again.
3. Whether the disputant stated that the result was in their favour.
4. Whether the disputant regarded the decision as fair.
5. Whether the Magistrate was fair in controlling the hearing.

Approximately half of all disputants responded favourably to all five of these categories. However, the lack of success is not closely identified with any one or any pair of the questions.

Table 106: Disputants Responding Favourably to All Five 'Success' Variables

Number of positive responses	Percentage of disputants
yes to all 5 variables	48%
yes to 4 of 5	9%
yes to 3 of 5	12%
yes to 2 of 5	10%
yes to 1 of 5	11%
yes to 0 of 5	10%

While the responses to questions were all related, they tended to fall into groupings based on the strength of the pariwise relations: one group (the satisfied): comprising those who were satisfied with the result and would use the Court again; and a second group (less satisfied) comprising those who thought the decision was in their favour, that the decision was fair and that the Magistrate was fair.

Interestingly, the disputants' perception of a favourable result is more closely related to their perception of fairness than with overall satisfaction. The simplest way to present the data in this aspect of the analysis is to show the percentages of participants in the different categories. Based on the unmatched data, the most common sets of responses and their frequencies are as follows:

<i>favourable</i>	<i>use again</i>	<i>satisfied</i>	<i>decision fair</i>	<i>Magistrate fair</i>	%
yes	yes	yes	yes	yes	48%
no	no	no	no	no	10%
no	no	no	no	yes	6%

Note that it is interesting that the third most common response group is those who would not use the system again, but who nevertheless regard the Magistrate as being fair.

Relations between the variables

Pariwise associations between variables can be 'measured' by the 'phi coefficient' which is in the range of zero to one and for which increasing magnitude reflects stronger association. The table of phi coefficients for the pariwise comparisons among the five variables is presented below in Table 107. Statistical analysis was subsequently utilised to transform the categorical responses into scaled variables

Table 107: Phi Coefficients of Success Variables

Use again	0.69			
Favourable	0.45	0.32		
Fair decision	0.58	0.49	0.74	
Fair settlement	0.44	0.38	0.51	0.56
	satisfied	use again	favourable	fair dec

Some factors which distinguish highly satisfied and the unsatisfied disputants
To distinguish between the two extremes, the disputants were divided into two groupings: those who answered positively to all five of the areas indicated above; and those who answered negatively to at least 4 out of 5 of the areas.

PREHEARING FACTORS

Three of the chosen variables related to procedural aspects of the Court: perceived level of preparation of the disputant, the convenience of the hearing and whether a lawyer was consulted

•*Perceived level of preparation:*

Almost all (94%) of satisfied disputants felt well prepared in contrast to only 55% of the less satisfied disputants.

•*Convenience:*

57% of the satisfied disputants found the Court convenient to use while only 27% of the less satisfied participants found the Court to be convenient.

•*Saw lawyer before hand*

Just under a third (30%) of the satisfied disputants sought legal advice from a lawyer before hand, in contrast to almost half (49%) of the less satisfied disputants.

•*Other factors*

There was no significant difference between the groups in respect of length of delay, type of case, dispute length or whether an insurance agent was involved.

HEARING PROCEDURES

- ***Attitudinal Factors.*** The single factor which provided the greatest separation between the groups was whether disputants felt they had the opportunity of presenting their case.⁴⁶³

Almost all (98%) of satisfied disputants felt they had an opportunity to present their case; while 50% of the less satisfied participants felt they had an opportunity to present their case.

- ***Aspects of the hearing.*** Two factors were identified as distinguishing the groups privacy and formality. While there was no statistically significant difference between the two groups on the importance attached to the need for either privacy or informality (both rated them as fairly important) there were statistically significant differences regarding their perception of how well this was achieved.

- ***Privacy***

Almost all (96%) of satisfied disputants perceived the hearing to be private while only 85% of the less satisfied disputants perceived the hearing to be private.

- ***Informality***

Almost two-thirds (63%) of satisfied disputants perceived the hearing to be informal

A little over one-third (36%) of less satisfied disputants perceived the hearings to be informal.

- ***Presence of a lawyer***

A third (32%) of the satisfied disputants thought that a lawyer should be present

Two thirds (65%) of less satisfied participants thought a lawyer should be present.

⁴⁶³ Significantly Conley and O'Barr (1990), *op. cit.*, also found that opportunity to present one's case was the most important factor influencing satisfaction with Small Claims.

- ***Nature of the decision***

There was no statistically significant difference between the groups in regard to whether the parties stated they wanted the Magistrate to make a decision or to reach an agreement with the other party; whether they disputants perceived that the Magistrate made the decision or an agreement was reached with the other party; or whether or not the participants made up their minds to compromise

- ***Claimant or Respondent***

There was a significant difference between claimants and respondents in percentages of satisfied participants. The vast majority of claimants (86%) were satisfied in terms of the five variables defined above; while in contrast only 52% of respondents answered positively to all five variables.

Matched Data: Views on Success

As noted above, claimants have a higher perceived satisfaction rate than do respondents. An examination of the matched data similarly reveals that for all five variables there is a negative correlation between claimant and respondent answers. In other words, in a case where the claimant judged the outcome to be successful, the respondent has a higher chance of judging the same outcome as unsuccessful and vice versa.

The patterns of interrelation between variables which contribute to the measure of success are similar for claimants and respondents

Variables Effecting Satisfaction Scale

The relative strength of relationships between the variable '*satisfaction*' (as measure on a '0-10 scale') and other variables are recorded below in Table 108). The statistic used to measure the strength of the relation is known as the phi coefficient when there are two categories for each variable and Cramer's V statistic when there are more than two categories for at least one of the variables. Both statistics have magnitudes in the range of zero to one. As shown in Table 108 below the variables which most strongly correlated to high satisfaction were whether the parties thought the decision was fair and whether they stated they would use the Court again.

Table 108: Effect of Satisfaction on Other Variables

Strength of the relation	variables
greater than 0.6	Would use the system again, fair decision
0.20 to 0.39	degree of preparation, degree of convenience, whether insurance company rep participated
0.10 to 0.19	degree of privacy, agreement/decision, importance of privacy, lawyer, dispute length, what they wanted to happen
0.00 to 0.09	party, importance of formality, delay, repeat user, mind made up before hand how much to compromise

6.12.6 Positive Aspects of the Small Claims Court

All disputants were asked to indicate the strengths or good points of the Small Claims Court.⁴⁶⁴ Three positive characteristics dominated the diverse and sometimes contradictory range of strengths listed by disputants: Small Claims Courts provide a low-cost, informal and speedy way to resolve disputes (Tables 79 and 80). Consistent with the desire of disputants for a decision as opposed to an agreement, quite a number of disputants rated this aspect as one of the key advantages of Small Claims.

⁴⁶⁴ The top three strengths from the NZ Study, at 100, were: 1. cheap; 2. informal, simple, friendly and 3. quick, no delays.

Table 109: Claimants' Views of the Strengths/Advantages of Small Claims Court

Response	Freq	%
Cheap	73	26.4%
Informal, simple, friendly	36	13.4%
Impartial; objective; fair Magistrates	31	11.2%
Non-legal; not court, no legal jargon, no lawyers	24	8.7%
Quick, no delays	20	7.2%
Parties can state their case, tell their own story	16	5.8%
Binding result; legality, final decision	12	4.3%
None	12	4.3%
Gets a resolution; a decision; no right of appeal	11	4.0%
Accessible to ordinary citizens; worthwhile taking small (\$) claim	10	3.6%
Works well; good method, sensible	10	3.6%
Emphasis on settling	7	2.5%
Frees up higher courts for other work; saves taxpayer money	5	1.8%
Private	4	1.4%
Convenient	2	0.7%
Stated "don't know"	2	0.7%
Formality	1	0.4%

- Note
1. Base: claimants who had a hearing
 2. No response/information: 42
 3. Claimants could give more than one response
 4. Avg number of responses given by those who cited strengths: 1.53

Table: 110: Respondents' Views of Strengths/Advantages of Small Claims

Response	Freq	%
Cheap	46	25.8%
Informal, simple, friendly	26	14.6%
Quick, no delays	21	11.8%
Non-legal; no legal jargon, no lawyers	19	10.7%
Impartial; objective; fair Magistrates	15	8.4%
Binding result; legality, final decision	11	6.2%
Private	9	5.1%
None	9	5.1%
Emphasis on settling	8	4.5%
Parties can state their case, tell their own story	8	4.5%
Allows communication	2	1.1%
Works well; good method, sensible	2	1.1%
Frees up higher courts for other work; saves taxpayer money	2	1.1%

- Notes:
1. Base: Respondents whose case did not settle prior to hearing
 2. No response/information: 28 (19%)
 3. Respondents could give more than one response
 4. Avg number of strengths listed: 1.53

6.12.7 Negative Aspects of the Small Claims Court

Disputants were also asked to indicate the weaknesses or bad points of the Small Claims Court. Though there is an obvious degree of discretion in coding responses and fewer categories could have been employed, it is nevertheless a very positive statement that so many disputants listed 'none' when asked to indicate the perceived weaknesses of the system.⁴⁶⁵

Table 111: Claimants' Views of Weaknesses of Small Claims Courts

RESPONSE	FREQ	%
None	38	19.39%
Enforcement; too long wait till payment; court has insufficient power	29	14.90%
Problems with service of process; getting things heard	25	12.76%
Party inexperienced; lack of knowledge	20	10.20%
Procedural problems (too rushed)	14	7.14%
Magistrate not qualified/experienced	10	5.10%
Magistrate prejudiced/aggressive	7	3.57%
Not legally correct; no legal representation; not based on reliable evid	6	3.06%
Convenience (night week/end ct)	6	3.06%
Too formal	6	3.06%
Successful litigant not adequately reimbursed for expenses	5	2.55%
No right of appeal	5	2.55%
Physical facilities inadequate	5	2.55%
Too much compromise involved	4	2.04%
Staff unhelpful	4	2.04%
Problems with witnesses	2	1.02%
Businesses at advantage	2	1.02%
It's anti-business	2	1.02%
Not all evidence taken into account (no witnesses)	1	0.51%
Need more than one Magistrate	1	0.51%
Monetary limit too low	1	0.51%
Other	1	0.51%
Abused by insurance companies	1	0.51%
Stated "I don't know"	1	0.51%

- Notes
1. Base: Claimants attending hearing
 2. More than one response was possible
 3. No response/information: 58
 4. Avg number given by those citing weaknesses: 1.20

⁴⁶⁵ The three major weaknesses of small claims reported in the NZ Study, at 102 were 1. referee not qualified; 2. too long to be paid, not enforced; and 3. referee prejudiced. Interestingly, in NZ the referees do not have to be legally qualified and many are not. In Tasmania, where the Magistrate is legally qualified and the system is part of the Court structure, there appears to be few qualms about the lack of qualifications of the Magistrate.

Table 112: Respondents' Views of Weaknesses/Disadvantages of Small Claims

Response	Freq	%
None	18	12.3%
Party inexperienced; lack of knowledge	17	11.6%
Magistrate prejudiced/aggressive	12	8.2%
Procedural problems (too rushed	12	8.2%
Magistrate not qualified/experienced	11	7.5%
Not legally correct; no legal representation; not based on reliable evid	11	7.5%
Successful litigant not adequately reimbursed for expenses	11	7.5%
Problems with service of process; getting things heard	6	4.1%
Physical facilities inadequate	6	4.1%
Not all evidence taken into account (no witnesses)	5	3.4%
Enforcement; too long wait till payment; court has insufficient power	5	3.4%
Need more than one Magistrate	4	2.7%
Too much compromise involved	4	2.7%
Monetary limit too low	3	2.1%
It's anti-business	3	2.1%
Abused by Ins Co	3	2.1%
Inconvenient	3	2.1%
Too formal	3	2.1%
Not enough on conciliation	3	2.1%
Problems with witnesses	2	1.4%
Too informal	2	1.4%
Filing fee too low	2	1.4%

- Notes
1. No response/information: 35 (24%)
 2. More than one response was possible
 3. Avg number of weaknesses suggested: 1.32

6.12.8 Suggestions for Improving Small Claims Court

Disputants were asked if they had any suggestions for improving Small Claims Courts.⁴⁶⁶

⁴⁶⁶ In NZ Study, at 105, the most frequently made suggestions for improvement were: 1. better information for the parties; 2. better referee qualifications; and =3.better coordination of service and attendance at hearings and greater access to the tribunal.

Table 113: Claimants' Suggested Improvements for Small Claims Courts

Response	Freq	%
Better information (about ct procedures, legal advice) for parties	22	14.5%
Stronger enforcement (awards, subpoenas, costs)	22	14.5%
Referee qualifications (more experience in real life)	14	9.2%
Administration	12	7.9%
Greater informality	10	6.6%
Greater access to the tribunal (Sat, evening hearings)	7	4.6%
Fix Delays in getting a hearing date	6	3.9%
Facilities (separate waiting room)	6	3.9%
More formality (less private, stricter rules of evidence)	5	3.3%
Panel (jury) of Magistrates variety of magistrates for repeat users	4	2.6%
Should be higher monetary limit	3	2.0%
Abolish it	2	1.3%
Debt claims suitable for Ct of Requests	1	0.7%
More finality. Reduce tendency to give 50-50 decisions	1	0.7%
Compulsory Insurance	1	0.7%
Don't Know	1	0.7%

Notes

1. Base: claimants attending a hearing
2. No response: 69

Table 114: Respondents' Suggested Improvements for Small Claims Courts

Response	Freq	%
None	25	24.5%
Better information (about ct procedures, legal advice) for parties	16	15.7%
Referee qualifications (more experience in real life)	15	14.7%
Administration (8	7.8%
More formality (less private, stricter rules of evidence)	8	7.8%
Greater informality	6	5.9%
Stronger enforcement (awards, subpoenas, costs)	4	3.9%
Facilities (separate waiting room)	4	3.9%
Panel (jury) of Magistrates variety of magistrates for repeat users	4	3.9%
Delays in getting a hearing date	2	2.0%
Need right of appeal	2	2.0%
Increase filing fee	2	2.0%
Should be higher monetary limit	1	1.0%
Better coordination	1	1.0%
Greater access to the tribunal (Sat, evening hearings)	1	1.0%
decision in person, not mail	1	1.0%
Abolish it	1	1.0%
More finality. Reduce tendency to give 50-50 decisions	1	1.0%

Notes

1. No information/response: 43 (41%)
2. Poor scheduling of hearings) interview separately, service rural areas better, correspondence)= examples of poor administration mentioned
3. (less legal jargon, more scope for flexibility, natural justice, more conciliation)= mentioned by R's under informality

6.12.9 Summary

Almost a quarter of claimants who attended the hearing and 15% of the respondents rated their satisfaction with the Small Claims Court as a perfect 10 out of 10. 66% of claimants and 51% of respondents rated their satisfaction with Small Claims Court as 6 out of 10 or better. Over three-quarters of claimants (78%) and two thirds (69%) of respondents stated that they would use Small Claims again should they have a similar dispute. The satisfaction of respondents is especially high given that only 36% of the respondents regarded the order as in their favour. This indicates that they see the benefits of the Small Claims system, despite having lost their individual case. Also, the greater the extent to which the disputant considered the outcome was in their favour, the more likely they were to give a positive rating as to future usage of the Court.

There was some evidence that the more well educated and higher income disputants were both more successful and more satisfied with Small Claims.

Almost half of the disputants (satisfied group) unanimously agreed with the following indicators: the decision was in their favour, that they would use Small Claims again, that they were satisfied with the Court and that they thought both the decision and Magistrate were fair. The other half of disputants (less satisfied group) answered negatively to at least one of these same categories.

The single factor which accounted for the major attitudinal difference between the satisfied group and the less satisfied group was that 98% of the satisfied group stated they had an opportunity to present their case, while only 50% of the unsatisfied group felt that they had an opportunity to present their case. Also, the satisfied group were less likely to have consulted a lawyer and more likely to feel they were prepared for their hearing, that the hearing was convenient, and sufficiently private and informal.

Fairness of the decision was the variable which most highly correlated to disputant satisfaction with Small Claims. The variables of degree of preparation, convenience, the participation of a representative from the insurance company were also fairly strongly correlated. In contrast, privacy, formality, seeing a lawyer before hand, length of time the dispute had been going on, and whether the parties reached an agreement or the Magistrate made a decision had little impact on ratings of success. The degree of formality, delays and whether

the parties had made their mind up before hand what they wanted to happen and whether they joined a third party had almost no impact on satisfaction ratings.

When requested to comment freely on the strengths of the Small Claims Court, three major aspects were frequently cited by both claimants and respondents; it is seen as cheap, informal and quick. These aspects meet with the principles of Small Claims Courts and Tribunals generally. In addition, claimants in particular commented on the non-legal aspects of the Court, the lack of lawyers, lawyers' fees and legal jargon.

When asked to state any weaknesses of the Small Claims system, 19% of claimants and 12% of respondents indicated that there were no weaknesses. Of those who cited weakness, claimants commented most frequently on problems of enforcement and having to wait too long to receive payment; problems with service of process and their inexperience and lack of knowledge of the system. Respondents commented most frequently on their inexperience and lack of knowledge of the system; the prejudice of the Magistrate and procedural problems.

When asked to suggest ways in which the Small Claims Court might be improved, the claimants most often suggested: better information for the parties; stronger enforcement; and better training for Magistrates. The Respondents most often recommended better information for the parties and better training for Magistrates.

6.13 ADMINISTRATION OF SMALL CLAIMS

6.13.1 Intra and Inter Court Governance

If the Tasmanian Small Claims Court is to be effective in bringing about the inexpensive, informal and expeditious resolution of disputes, the administration of the Court must be viewed as an entire system in which records management, forms, scheduling, filing procedures, staff training, hearings, enforcement etc all form part of an integrated whole devoted to fulfilling the aims for which the Court was established. Although an in-depth analysis of the intra Court governance, the administration of the Tasmanian Small Claims Court, was beyond the scope and resources of the present study, a number of administrative issues emerged which are important and accordingly are discussed below.

There are also important issues of inter-Court governance. This is especially so between the Small Claims Court and the Court of Requests. While a detailed discussion of such issues is beyond the scope of this thesis, it is important to make the point that the Small Claims Court must be viewed as one part of a wider Court system. Consequently, before reforms are made at the Small Claims level, consideration must also be given to the impact of such reforms on the Courts at other levels in the system. Two examples will help illustrate the point. If Tasmania should decide to increase the jurisdiction of the Small Claims Court from its present level of \$2000 to \$5000, this would most certainly have an immediate impact on the Court of Requests which is also limited to actions involving claims up to \$5000. Thus, the most appropriate course may be to consider a proportional increase in the jurisdictional limit of the Court of Requests. If such a move is undesirable, then one must balance the benefits gained by raising the limit of Small Claims against any perceived detrimental effect on the Court of Requests. A second example shows that effects can also flow in the reverse direction. Because Small Claims Court judgments are enforced by the same administrative organ which handles all other Court judgments, policy changes in enforcement at a systems wide level will have an impact on Small Claims.

6.13.2 The Relationship of the Small Claims Court to Other Dispute Resolution Bodies

One of the most important findings of this study is the existence of a symbiotic interrelationship between the Small Claims Court and other dispute resolution bodies such as Consumer Affairs and Community Legal Service Centres. This

being the case, it is vital that better linkages be established and maintained between various organisations.⁴⁶⁷ These linkages should be characterised by coordination, referrals and regular communication. At present, the Tasmanian Small Claims Court occasionally refers disputants to Legal Aid and enjoys a close working relationship with Consumer Affairs. However, it is important that bridges be built as well with other alternative dispute resolution agencies.

As United States Supreme Court Justice Sandra Day O'Connor⁴⁶⁸ has pointed out:

The Courts . . . should not be the places where the resolution of disputes begins. They should be the places where the disputes end--after alternative methods of resolving disputes have been considered and tried.

Thus, there is emerging a view of Courts as 'multi-door centres'⁴⁶⁹ where disputes upon intake can be diagnosed and referred to the most appropriate forums, some being referred to less formal resolution methods; while others, because of the type of case involved or the nature of the parties, require a formalised adversarial type hearing.⁴⁷⁰

6.13.3 Jurisdiction of the Small Claims Court

A majority of the Magistrates interviewed felt that the jurisdictional limit of the Small Claims Court should be increased, with most preferring an increase to \$5000 to bring Tasmania in line with the majority of Australian States.⁴⁷¹ It was also recognised, however, that an increase in the Small Claims jurisdiction would of necessity entail a corresponding increase in the jurisdiction of the

⁴⁶⁷ 'Toward the Multi-door Courthouse--Dispute Resolution Intake and Referral' (July 1986) National Institute of Justice Reports (SNI 198).

⁴⁶⁸ *Ibid* 1.

⁴⁶⁹ *Ibid* (The concept of a 'multi-door courthouse' is attributed to Professor Frank Sander of Harvard at the 1976 Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, 'The Pound Conference'.) See also, P. B. Edelman, 'Institutionalizing Dispute Resolution Alternatives' (1984) (9) (2) *The Justice System Journal* 134.

⁴⁷⁰ *Ibid*.

⁴⁷¹ See Summary of Interviews, *op. cit.* s 3.

Court of Requests. The vast majority of Magistrates felt that the jurisdictional limit should be raised. In fact, when one considers the initial limit of \$2000 established in September 1985, inflation figures alone suggest that the Small Claims Court limit is ripe for review. So does the fact, mentioned earlier, that the largest single category of claims is the full \$2000, suggesting that claimants have often given up part of a legitimate claim in order to fall within the Court's jurisdiction. The major exception to the view that the jurisdiction limit should be increased was Mr Chen⁴⁷² who felt the amount should be lowered to \$1000 except for motor vehicle cases in which the amount should stay the same. However, there was a division of opinion regarding the extent to which the jurisdictional limit should be increased. Mr Hill⁴⁷³ felt that it should not go above \$3000. Most suggested it should be increased to \$5000 to be consistent with the majority of Australian States. However one Magistrate would like the jurisdiction increased to \$10,000. Also, all Magistrates noted that an increase in jurisdictional limit for Small Claims would require a corresponding increase in the limit for the Court of Requests.

It was also noted that on a purely economic basis, it is more efficient (less expensive) to have a case tried in Small Claims than the Court of Requests. The other side of the argument is that the more serious the amount of money becomes, one is no longer talking about 'small' claims. Moreover, the more serious the claim, the more important it is that people have access to legal representation, something which is denied in Small Claims Court. Thus, Mr Chen⁴⁷⁴ cautioned that, absent the procedural and evidentiary safeguards present in a formal adversary system in which professional advocates represent the disputants, it is only very 'rough' justice which is achieved.

As to the type of case suitable for Small Claims determination, there was little support from those interviewed for expanding the jurisdiction of the Small Claims Court to include other types of actions. One exception was from the

472 Personal communication as noted previously, See Summary of Interviews, *op. cit.* s 3.

473 Personal Communication with Mr Hill, as noted above, See Summary of Interviews, *op. cit.* s 3.

474 Personal Communication with Mr Chen, as noted above, Summary of Interviews, *op. cit.* s 3.

Justice Department⁴⁷⁵ which spoke of reforms to bring Government departments and officers within the Court's jurisdiction. Magistrate Hemming,⁴⁷⁶ however, noted that government departments routinely submit to the Court's jurisdiction now.

6.13.4 Class Actions/Grouped Proceedings/Standing

Related to the question of jurisdiction is the extent to which a Small Claims Court should allow grouped proceedings or class actions. The legal, economic, social and political impact of procedural devices for representing the public and group interests have been the subject of much debate.⁴⁷⁷ From a comparative perspective, one justification for the vehicle of a class action lies in what Cappelletti calls the 'massification' of modern society:

Our contemporary society--or, to use a more ambitious term, our civilization--is frequently characterized as a 'mass production/mass consumption' civilization. That characterization reflects, no doubt, a typical feature of modern economies in all parts of the world--'massification'. But this feature extends far beyond the economic sector, it characterizes social relationships, feelings, and conflicts as well. . .

More and more frequently, because of the 'massification' phenomena, human actions and relationships assume a collective, rather than a merely individual, character; they refer to groups, categories, and classes of people, rather than to one or a few individuals alone. Even basic rights

⁴⁷⁵ Personal communication with Mr Peter Maloney, as noted previously, Summary of Interviews, *op. cit.* s 4.

⁴⁷⁶ Personal communication with Mr Hemming on numerous occasions, Summary of Interviews, *op. cit.* s 3.

⁴⁷⁷ See for eg, ALRC, Grouped Proceedings in the Federal Court, Report No 46, (1988) (Canberra, AGPS); R. Baxt, 'Class Action Legislation--a Mirage for the consumer?' (1992) 66 *ALJ* 223; Williams, S., 'A Class Act?' (1992) 66 *LIJ* 376; 'Debate --Class Actions: The Case For/Against' (1989) 63 *Law Institute Journal* 1132; Sedler, 'Standing, Justiciability and All That: A Behavioural Analysis', (1972) 25 *Vand. L. Rev.* 479; R. Adler, 'The Viability of Class Actions in Environmental Litigation', (1972) 2 *Ecology L. Q.* 533; Note, 'The Cost-Internalization Case for Class Action', (1969) 21 *Stan. L. Rev.* 383.

and duties are no longer exclusively the individual rights and duties of the eighteenth- or nineteenth-century declarations of human rights inspired by natural law concepts, but rather meta-individual, collective, 'social' rights and duties of associations, communities and classes.⁴⁷⁸

It is thus necessary to abandon the *laissez-faire*, nineteenth century concept of litigation. 'The new social, collective, 'diffuse' rights and interests can be protected only by new social, collective, 'diffuse' remedies and procedures.⁴⁷⁹ Recently, in the United States Small Claims Courts have been utilised by groups of consumers who have effectively filed successive Small Claims actions en masse over a period of months.⁴⁸⁰ In one case,⁴⁸¹ a group of 172 residents, angry at airport noise levels, attracted wide publicity⁴⁸² and forced airport management to personally defend one Small Claims case after another until the exhausted defendant agreed to strict noise control standards. No evidence of similar consumer activism exists in Australia, but in theory at least there is no reason that Small Claims Courts could not be used in the same way.

Several of the Magistrates interviewed favoured the introduction of some type of class action procedure in Small Claims.⁴⁸³ Even without amending the existing legislation, Mr Sikk⁴⁸⁴ could see no reason why the Court could not advertise a particular case and invite any other claimants with the same legal and factual issues to also submit a claim. In fact, recent English and Australian cases⁴⁸⁵

478 M. Cappelletti (1989) *op. cit.* 270-272.

479 *Ibid.*

480 See A.D. Freeman and J. E. Farris, 'Grassroots Impact Litigation: Mass Filing of Small Claims' (1992) 26 (2) University of San Francisco Law Review 261.

481 *City and County of San Francisco v Small Claims Court* (no 263365 (Cal. Super. Ct, San Matea County 1983).

482 For a list of newspaper articles written by various plaintiffs in the action see Freeman and Farris, *op. cit.* 262, n. 3.

483 See e.g., Interview with Magistrate Sikk, 23 August, 1990, Summary of Interviews, *op. cit.* s 3.

484 *Ibid.*

485 See *Prudential Assurance Co Ltd v Newman Industries Ltd* [1979] 3 All ER 507; *Bishop v Bridgelands Securities Ltd* (1990) ATPR 41-060; *Springfield Nominees Pty Ltd v Bridgelands Securities* (1991) ATPR 41-078.

support the view that a limited form of representative action has existed since 1901.⁴⁸⁶ Also, the *Consumer Affairs Act 1988* (Tas) allows the Director of Consumer Affairs to initiate or defend an action on behalf of consumers in certain circumstances.⁴⁸⁷ Mr Peter Clemes, Tasmanian Director of the Trade Practices Commission,⁴⁸⁸ also supported it. Given the 'consumer' emphasis of Small Claims Courts, the availability of class actions or grouped proceedings should be explored.⁴⁸⁹

6.13.5 Filing of a Claim; Definition of 'Claim'

Several registrars⁴⁹⁰ who were interviewed were of the opinion that one of the most difficult aspects of Small Claims procedure was determining the definition of 'small claim'. Some traders circumvent the restriction against using the Small Claims Court as debt collection by manipulating it to look like a dispute format and institute it as a dispute and collect. Other registrars⁴⁹¹ noted that a number of business people have become upset when they discover that the mere collection of an unpaid debt does not fall within the definition of small claim and that the system was specifically designed to prevent the Court adjudicating such matters. Similarly, some insurance companies take a \$20 gamble (the price of the filing fee) and use the Court as a mechanism to either contest liability under a policy or refuse to pay.

Rejection of claims outside the Court's jurisdiction is usually done by the registrar or deputy registrar in consultation with the Magistrate. Mr Hamilton⁴⁹²

486 The early case of *Duke of Bedford v Ellis* [1901] AC 1 allowed a limited form of representative action.

487 *Consumer Affairs Act 1988* (Tas), s 11(12)(a).

488 Personal Communication with Mr Peter Clemes, on numerous occasions, see Summary of Interviews, *op. cit.* s 5. The Trade Practices Commission can also bring a representative action on behalf of consumers. See *Trade Practices Act 1974* (Cth) s 87(1B).

489 For a good discussion of some of the policy issues involved see K. Orren, 'Standing to Sue: Interest Group Conflict in the Federal Courts' (September 1976) 70 *American Political Sciences Review* 723; R. S. Melnick, *Regulation and the Courts: The Case of the Clean Air Act* (1983) (Washington D.C, The Brookings Institution).

490 See e.g., Interview with Mr Paul Huxtable, as noted previously, Summary of Interviews, *op. cit.* s 4.

491 See Summary of Interviews, *op. cit.* s 4.

492 Personal Communication, as noted above, See Summary of Interviews, *op. cit.* s 4.

noted that approximately one in ten claims appeared outside the Court's jurisdiction. However, some of these were later accepted when further questioning revealed that the fault lay in an incorrectly completed claim form. Also, if a disputant had received advice from a solicitor that the matter was within the jurisdiction of Small Claims, the claim form was accepted with the admonition that the Magistrate may find otherwise. No register is kept, in any region, of the number of claims rejected or reasons for rejection. However, most interviewees agreed that a record of rejected claims would be useful, if for no other purpose than gaining some evidence about public awareness of Small Claims procedures.

6.13.6 Costs of Filing

The \$20 filing fee to initiate a Small Claims action in Tasmania is typical of that charged in other jurisdictions. Since the date of this study, however, the fee has been increased to \$25. Although most of those interviewed were satisfied that the fee should remain unchanged, a few suggested a sliding scale based upon amount in controversy. One Consumer Affairs officer⁴⁹³ felt the filing fee should be higher in order to discourage nuisance claims. Still others felt that there should be provisions for a scaled fee based upon the amount claimed.

6.13.7 Scheduling the Hearing

Present Scheduling Pattern

There are three primary goals of any caseload management program: 1) fairness to the litigants; 2) overall effectiveness and timely management of all the cases processed through the Court; and 3) equal treatment of all litigants.⁴⁹⁴ The achievement of these goals are especially critical to the effectiveness of a Small Claims Court which aims at the efficient and speedy resolution of disputes. The Court schedules Small Claims hearings at one hour intervals. This avoids a problem identified in some jurisdictions,⁴⁹⁵ of disputants having to wait around

⁴⁹³ Interview with Mr Don Heywood, Consumer Affairs, 22 June, 1990, see Summary of Interviews, *op. cit.* s 5.

⁴⁹⁴ M. Solomon, *Case Flow Management in the Trial Court*, supporting study 2, American Bar Association Commission on Standards of Judicial Administration, (1973) (Washington D. C., American Bar Association.).

⁴⁹⁵ Ruhnka and Weller, *op. cit.* 117 (granting of continuances, though not a major problem, were used occasionally to harass an opposing party. They also tended to double the amount of time taken between filing and hearing)

all day long for their case to be called. Also, given that almost one half of the cases heard in Small Claims are automobile cases, the Court has recently made an effort to schedule 'in a block of time' the cases involving one company. This minimises the time and days required during which an insurance representative must be available for the hearing.⁴⁹⁶

Scheduling depends greatly upon the volume of cases. There was little incidence in Tasmania of cases reported elsewhere⁴⁹⁷ of disputants waiting all day for their hearing. Tasmania's system of scheduling hearings at predicted intervals of approximately one hour appears to be working well.⁴⁹⁸

More problematic is the increasing number of cases and resultant delays between filing and hearing date which must be handled by a Small Claims system which has limited resources. Magistrate Hill⁴⁹⁹ highlighted the dangers of delays in Small Claims matters:

People don't want to wait 6 months for a \$500 dispute. And a lot of people, I am told by the registrar, when they find it is going to take that long to get a hearing, just walk away. I don't know what it is now, but when I was doing it, the waiting period was 10-12 weeks and that's unforgivable. If you have that sort of delay in that area it defeats the purpose of the legislation.

Also, the longer the delay, the greater that likelihood evidence is destroyed, perceptions distorted, parties frustrated and so on.

⁴⁹⁶ Special calendars based on case type have proven to be quite successful in other jurisdictions. See P. Wolfe, *Small Claims Courts: Records Management and Case Processing* (1980) (Williamsburgh, Va, Centre for State Courts) at 53.

⁴⁹⁷ See Ruhnka and Weller, *op. cit.* 123-127; Wolfe, *op. cit.* 50-52..

⁴⁹⁸ Overall in the Iowa study (at 481) the time between filing and trial was within two months in 77% of the cases; and 24% of trials were held within 20 days of filing; 25% within twenty to forty days; 27% between forty and seventy sixty days. The average time between filing and trial was 40 days for cases without a continuance and 97 days for cases in which a continuance was granted.

⁴⁹⁹ Personal communication, as noted previously, Summary of Interviews, *op. cit.* s 3.

The Chief Court Administrator⁵⁰⁰ and Justice Department⁵⁰¹ also saw delay as a potentially serious problem and symptomatic of how overtaxed were the Court's resources. At the time of interview, delays between the date of filing and hearing in Hobart were averaging almost six months, though the problem was less acute in the other regions of the state. Ideally, according to Mr England, Chief Court Administrator, the delay should be no longer than six to eight weeks.⁵⁰² Delay was seen as costly, not only to litigants but to the system of justice as well. As Mr Hamilton⁵⁰³ noted:

It's bad to have delays in Small Claims. It causes a lot of problems; it creates a lot of extra work. People start ringing up, inquiring, wanting to know why there are delays. They start booking holidays and things like that. It really is essential to get the claim heard quickly. . . I would like to see us get to the stage that if the claim's filed, the notices get sent out to the defendant at the end of 2 weeks. At the moment a notice of the hearing is not sent out for anything up to 8 weeks later.

Similarly, a Jim Cummings, a Consumer Affairs Officer, observed:

Delay is a real problem. In a lot of cases, the parties just can't hang on that long". "eg of a car which was allegedly faultily repaired". She just had to make arrangements to get the car on the road.⁵⁰⁴

500 Mr David England, personal communication as noted above, Summary of Interviews, *op. cit.* s 4.

501 Personal communication with Mr Peter Maloney, *op. cit.*

502 Personal communication with Mr David England, *op. cit.* See Summary of interviews, *op. cit.* s 4. The delay problem appeared to be most severe in Hobart and least severe in Burnie. It must be noted, however, that the problem of delays has now been largely overcome with the temporary employment of another full-time Magistrate until the docket was cleared. As a result there is at present little trouble with delays at

503 Personal communication as noted above. See Summary of Interviews, *op. cit.* s 4.

504 Personal communication, Consumer Affairs Focus Group, *op. cit.*

Average Delay

From the point of view of the administration of Small Claims an important time lapse is that between the filing and the date set for a hearing.⁵⁰⁵ The Justice Department has been concerned about the problem of delay and the average delay in Hobart now running at 30 days, when in contrast, at the time of the study, it averaged 128 days.⁵⁰⁶ Below (table 115) is a summary of average delay times based upon the researcher's survey of Small Claims files.

Table 115: Delay from Filing Date of Claim to Setting of Hearing

Days	Freq	%
0-60 days	19	3.1%
61-120	261	43.4%
121-180	251	41.7%
180 +	71	11.8%
Total	602	100%

128.31=avg delay Hobart

Notes: Base: cases which did not settle before hearing. Thus, excluded from total are cases which settled; missing files: 15 and incomplete files.

6.13.8 Court Personnel: Training

Another important administrative issue is staff training. Small Claims Courts are different from ordinary and more formal Courts in that the litigants themselves draft and file pleadings, marshal the evidence, conduct the hearing, and so on. Thus, Court staff are called upon to give a level of assistance which is far more detailed, personal and involved than the type of assistance required in more formal Courts where lawyers handle all such matters. In order to handle this special role, Small Claims staff require training which is specific to the type of work and skills required in administering a Small Claims system. As Wolfe⁵⁰⁷ states:

⁵⁰⁵ Compare deVaus, at 76; 10% of the claims were heard within one month; 51% within two months; and 78% within 3 months. See also, Iowa Study, at 509 (number of days between filing and judgment 1-10 days (11.8%); 11-30 days (22%); 31-60 days (43.4%) 61-90 days (16.5%); 91-120 days (7.5%); over 120 days (9%)).

⁵⁰⁶ Response of Registrar Paul Huxtable to the researcher's Preliminary Report on Small Claims in Tasmania, April, 1991.

⁵⁰⁷ Wolfe, *op. cit.* 53-54.

Regardless of how sound the administrative and procedural structures and innovations may be, no system will function properly without adequately trained staff who understand and are concerned with the unique function of the Small Claims process. Although competent, friendly and helpful staff should be a major concern of any Court clerk, these qualities are particularly required of Small Claims personnel working with *pro se* litigants under the Small Claims philosophy of public service. Since the Small Claims Court clerk's office will be the first direct contact a litigant has with the system, the courtesy and competence of the clerk's staff is as important as the presence of these qualities in the Small Claims judge.

Unfortunately, until recently, few Courts have had formal training programs and the pressures of increasing workloads and reduced public sector resources has meant that even on-the-job training is difficult.⁵⁰⁸ For example, Orrick⁵⁰⁹ recently described the management skills of Court administrators in the United States in these terms:

As a direct result of the general lack of qualifications for the Court administrator positions, it is not surprising to find that the most sophisticated management techniques, whether or not dependent on the use of the most up-to-date technology, are not being used in America's Courts. It is not to criticize the incumbent Court administrator to note this, when the explanation is probably that most of the incumbents have never received any formal management training. In far

508 *Ibid.* 55.

509 D. Orrick, 'Court Administration in the United States: The On-going Problems' (1990) 19(1) *Anglo American Law Review* 36, 43.

too many of America's Courts, even highly cost-effective personal computers are still not being used for much of the humdrum repetitive accounting and word processing work the Courts must perform. One would not, could not expect to see them in operation if the administrator himself is unaware of their capabilities. The lack of up-to-date equipment in a Court may be more apparent to the casual visitor than the lack of up-to-date management techniques, but both absences reduce the highest efficiency of the Courts.

Historically in Tasmania, the Small Claims division was established at a minimum level of resourcing.⁵¹⁰ No specialised training of any kind was given. The major form of training is on the job: senior employees training younger ones. While specialised training for Small Claims staff was not provided in the past, the present Chief Court Administrator did acknowledge the need for more specialised training, especially for the deputy registrars who, in recent months have begun to conduct conferences with disputants. Not surprisingly, all of the registrars, who have responsibility under the new legislation to conduct pre-hearing conferences, stated that they felt the need for additional training in this area.⁵¹¹ The registrars who were interviewed also underscored the need for more training for the counter staff in how to deal with the public as well as more information about the Small Claims legislation itself.⁵¹²

Like the Magistrates, the Community Legal Service (CLS) people stressed the importance of staff, specifically trained for Small Claims. For example, a CLS director observed:

I don't believe that all the staff are well versed in Small Claims. In part this is because there is one common registry for the Court of Requests which includes Small Claims and the staff are so busy

510 Personal communication with Chief Court Administrator, Mr David England, *op. cit.*

511 *Ibid.*

512 *Ibid.*

with other tasks that there is little time for or training in assisting people with small claims. At least a seminar is warranted for registry staff in how to better assist with small claims. That seminar could also involve people from community groups and CLS.⁵¹³

One substantial aid to such training is the development of a procedural manual to assist in the training of new staff and to ensure consistency of operations amongst existing staff. This procedural manual should contain: a copy of all forms, instructions and explanations for the completion and use of forms, examples of the types of assistance which is expected of court staff and clear guidance regarding the distinction between giving assistance and legal advice; training on the determination of what constitutes a 'small claim'; suggestions on how to make the best use of the time lag between defined functions, instructions about when particular documents must be completed and procedures performed, a narrative discussion of the purpose of procedures and forms job descriptions, personnel policies and flow charts so that people understand where and how they fit in to the system as a whole.⁵¹⁴

As for specific training programs, it is important that there be a good program-fit between the specific needs of Small Claims Court staff and the training provided. Some of the areas such training might cover, however, are: dealing with disputants in general; handling specific disputants with special needs (e.g., migrants, the elderly, the disabled, the illiterate); distinction between a claim and a mere debt recovery; communication skills, active listening, interviewing skills, etc).⁵¹⁵

6.13.9 Helping Small Claims Disputants to Help Themselves

One of the most notable features of Small Claims Courts and Tribunals is that litigants conduct their own cases. While such self-help can be an empowering

⁵¹³ Personal communication with Mr Reg Marron, Hobart Community Legal Service. See Summary of Interviews, *op. cit.* s 4.

⁵¹⁴ Wolfe, *op. cit.* 55-57.

⁵¹⁵ My thanks to Ms Patricia Georgee, Project Officer, Administrative Review Council, for informing me about the Administrative Review Council Training and sharing her ideas with me.

experience for the astute and the educated, it can be a significant barrier to access to those who are uneducated and intimidated by a Court system of which they have little understanding or experience. Accordingly, it is vital to the success of a Small Claims Court that disputants be helped to help themselves.

One of the most obvious ways this can be done is through personal assistance from Court staff who are specifically trained regarding the needs of Small Claims disputants. As seen in earlier sections, the Tasmanian Court staff rate well in this regard, even though most disputants would like to have even greater assistance. A second medium of help is found in the literature which the Court makes available to disputants. Thus, most Small Claims Systems have developed information sheets, handbooks and other written material to assist litigants.

Small Claims Brochure/Handbook

First, it must be made clear that a litigant handout can never replace personal advice from Court staff. Nevertheless, it can help a great deal.⁵¹⁶

Wolfe⁵¹⁷ maintains that the following elements should be included in brochures or handbooks for users of Small Claims Courts:

- Description of the Small Claims Court and how it works
- Types of actions allowed in Small Claims Courts and examples of each.
- Whom to sue and how to determine who is a proper defendant to name in the case.
- Where to file.
- Venue requirements if the parties and the transaction are not from the same locality.

⁵¹⁶ Interestingly, in the Weller and Ruhnka Study, *op. cit.* 192, only 4 of 15 Small Claims Courts produced litigant handbooks.

⁵¹⁷ R. Wolfe, *Small Claims Courts: Records Management and Case Processing* (1980) (Williamsburgh, Virginia, National Center for State Courts) at 63.

- How to file.
- Available assistance from the Court and other agencies.
- Costs, including time commitments, need for child care, etc.
- Service of process.
- Witnesses and evidentiary requirements.
- Counterclaims explained and defined.
- Continuances: The availability of and procedures for requesting continuances should be explained.
- Default Judgments explained.
- Collection Procedures.
- Recording Payment of Judgment.

Based on the above criteria, the Tasmanian brochure, (see Appendix B) though generally satisfactory, could be improved in the following areas:

1. More information should be provided regarding 'alternatives' to Small Claims. As mentioned above, the relationship between Small Claims and other more informal methods of dispute resolution is a symbiotic one. Accordingly, it is important that disputants realise that other alternatives do exist, what they are, and how to access them. An important part of this information is the importance of separating debt-collection problems from genuine legal disputes. In short, parties must be informed of the true costs of pursuing a small claim, ie that they: must initiate the action and prepare their own case, have limited rights of appeal, possible enforcement problems, may have to be absent from work at their own expense, etc. The existing brochure makes many of these points, but, they require more emphasis so that disputants know what to expect and not to expect from Small Claims.
2. On a related point, more information should also be provided regarding the availability of free legal advice.

3. It should be made clear that if the amount in controversy is above \$2000, a disputant can elect to forego part of one's claim in order to come within the Court's jurisdiction.
4. More attention should be given to a description of available amenities, including the parking facilities, buses, interpreters, telephones etc. Perhaps this could be done on a separate handout to be given at the hearing or with the greater use of posters.
5. Also, in helping people to decide whether or not to avail themselves of Small Claims, more emphasis should be given to the fact that obtaining a favourable decision is only half the battle; and that enforcement of the Court order may prove to be difficult, especially against a recalcitrant respondent or one who has few assets.
6. The layout and design of the brochure could be improved. For example, in its present form the typing is too large, the headings (all in caps) do not immediately catch the reader's attention and are too wordy. More concise wording and variety in type size and style of print should be employed to make the document more readable. An effort should also be made to make the brochure gender-neutral.
7. Consideration should also be given to the design of a separate brochure for respondents. Presently, the brochure is provided only to claimants. However, both parties receive a one page notice (Appendix B) with brief instructions to the claimant on the front and to the respondent on the back side. Given the fact that the claimant has also had the benefit of the brochure, the sum total of information provided seems to favour claimants.
8. Finally, in addition to the brochure, an information video should be prepared which can be borrowed for a small deposit to be refunded on the return of the video. The video might also be available in the waiting rooms to help parties prepare for their hearing.

Form Design

The Tasmanian legislation mandates that assistance be given to disputants in filing their claim. One aspect of that assistance must relate to Court forms. This means that Court personnel have a duty to assist Small Claims disputants in ways which go far beyond normal Court actions in which lawyers do most of the work for their

clients. One aspect of making Small Claims easier to use relates to Court records and forms.

The following principles in regard to Court records and forms is adapted from Wolfe:⁵¹⁸

- *Language should be easily understandable to the general public.* Thus, latin terms, and unnecessarily technical language should be avoided.
- *Language should be neutral to both parties.* 'Court forms maintaining language such as "you are commanded to appear" generally appear threatening and they often create the impression of being anti-defendant.'⁵¹⁹
- *Only essential information should appear on the face of the record.* Forms should not be cluttered with information. They should be self-explanatory and easy to complete.
- *Forms should be easily identified.* Forms should be clearly titled with a space for recording individual case numbers in one consistent easily identifiable location on the form.
- *Forms should be designed for easy completion.* Not only should records be easy to understand; they should also be easy to complete. This applies for Court staff making entries on the form as well as disputants. Extensive use should be made of check boxes and other devices which facilitate easy form completion.
- *Forms should be designed to expedite handling.* This means that information should not be unnecessarily duplicated and that form design should also consider statistical reporting, case summaries and other functions which must be performed.
- *Record size should be standardized.*

⁵¹⁸ *Ibid.* 4.

⁵¹⁹ *Ibid.* 4.

- *The number and types of forms and records created by and submitted to Small Claims should be limited.* If Small Claims Courts are to meet their goals then forms must be kept to a minimum.

Again, while a detailed analysis is beyond the scope of this study, it is clear that many of the forms utilised in Small Claims could be improved.⁵²⁰ Generally, forms seem to be congested, titles could be more distinctive, and language could be simplified. To take one example, the General Claim Form (Appendix A1) is too congested; the proportion of ink to page is too high, especially on the upper half of the form. All of the little boxes for each letter of a person's name or telephone number are also off-putting and confusing. Also, the 'Particulars of Claim' with its many round brackets all on top of each other is similarly confusing. It would also be easy to put a tick in the wrong spot. At the bottom of the form, it is not clear whether the 'Date', 'Fee Paid \$. . .' and 'Receipt No: . . .' are to be completed by the Court staff or the disputant. Finally, the language could also be simplified. For example words like 'rectification' would be intimidating and likely not understood by those with little education.⁵²¹

Helping Disputants to Understand the Small Claims Hearing Process.

Not only must written forms be easily understood, but Small Claims Court staff and Magistrates must be highly sensitive to the *pro se* nature of Small Claims proceedings. Several incidents during the present study illustrate the point. First, on two occasions during my observations, at the end of the hearing and after the Magistrate had left the room, the parties turned to me and asked 'Is it over? Are we free to go?'. It was clear that they needed more guidance --sign-posting--to help disputants work their way through the Small Claims process.⁵²² On another occasion, the parties, with the aid of the Magistrate, were engaged in the process of trying to work out a settlement. However, it

520 In a recent interview, (Personal communication of April 1992) the Registrar, Mr Huxtable, indicated that a forms design specialist has come to the same conclusion and has already begun to redesign Small Claims forms.

521 Contrast the Motor Vehicle Accident Form which has been recently redesigned see Appendix A2.

522 See Ingleby (1991), *op. cit.* 94-95. ('In the Small Claims cases which were not settled by agreement, or adjourned to another hearing, the referee had to make it clear that they had finished the questioning of the parties in the arbitration phase. This might be done, as in SCTI, by asking the parties it [sic] they had, "anything more to say?" and then proceeding to give the decision immediately--"I've pretty well decided. . .accept industry evidence. . .satisfied not the fault of the trader. . .claim dismissed because not substantiated').

was clear that the disputants were confusing the settlement discussion in which they were presently engaged with the hearing which was about to come. Finally, on yet another occasion, and as fortune or fate would have it, I became involved in my own case before the Small Claims Court. Even though legally trained and having practiced as a lawyer for three years and very aware of what to expect, I was taken back by how apprehensive and threatened I was by the prospect of having to present my own case.

The point to be made here is that Court staff and Magistrates must be conscious of the fact that disputants need guidance. Parties need to know exactly what to expect in each phase of the proceedings. They need verbal and written 'signs' which tell them: 'this phase is ending; and another is about to begin'. In other cases, after discussing a complex factual situation, parties need a summary of exactly what it is they have agreed upon, or what has been decided.⁵²³ Indeed, it has been argued that parties need a 'celebration or otherwise of the dispute having been resolved.'⁵²⁴ For example, in a settlement case this might be a simple 'thank you very much, always much better for claims to be settled, everyone wins, thank you for coming.'⁵²⁵ In short, as the drama of Small Claims Court unfolds for the parties, a denouement is required to let everyone know that the plot has been unravelled and the play is ended.

As to the types of assistance which Small Claims Courts should provide, Wolfe⁵²⁶ mentions some of the following: assistance in filling out Court forms, finding the proper name and address of the respondent and other parties, explanation of Court procedures, where to obtain further help, and case screenings.

The need for special guidance for *pro se* litigants continues through the hearing stage of a small claim. Accordingly, the Magistrate, before properly commencing the hearing should explain to the parties what is going to happen. In the Victorian Small Claims Tribunal, for example, there are large plastic cards on the table in front of disputants which outline and explain the order of

523 *Ibid* 95, citing G. Kirkpatrick, 'The Good, the Bad, the Indifferent' (1988) 21 *Mediation Quarterly* 37, 44.

524 Ingleby (1991), *op. cit.*, 95.

525 *Ibid.*

526 Wolfe, *op. cit.* 60.

proceedings and what to expect at each stage. If a disputant becomes disoriented, the Magistrate can point to the card and indicate 'Mr Smith, we are now at point four.' Developing such skills as verbal sign-posting, is one aspect which should be part of Small Claims training, a topic to which we now turn.

6.13.10 Magistrates

The Role of the Magistrate in Court Administration

The Tasmanian Small Claims Court, as a division of the Magistrates Court, is administered by the executive branch of government under the direction of Mr David England, the Chief Administrator of Courts. Mr England works in close consultation with the Chief Magistrate, Mr Morris. While the State's full time Small Claims Magistrate attends regular meetings between Magistrates and administration and is consulted and allowed to have input into matters of Court Administration, the administrative structure is predominantly hierarchical. Given the trend in other jurisdiction to devolve greater administrative responsibility to the judges who are involved with the Court at that level,⁵²⁷ consideration should be given to grant the State's only full-time Small Claims Magistrate greater control over the operation and management of the Court. This would enable the Magistrate, in collaboration with the Small Claims Registrar and other Court staff and in consultation with community groups, to respond more quickly to the needs of those who utilise the Small Claims system. Such an approach would also be consistent with recent management theory which calls for flatter, leaner administrative structures which give more power to those at 'the coal face'.⁵²⁸ Finally, it must also be acknowledged that giving the Magistrate greater responsibility must also be accompanied by the necessary training and resources required to do the job. Finally, it must be made clear, that arguing for more involvement and consultation between Court administrators and Magistrates, is not to make a claim for more administrative details to be 'dumped' upon the plate of Magistrates who already have too much on their

⁵²⁷ See Justice McGarvie, 'Judicial Responsibility for the Operation of the Court System' (1989) 63 ALJ 79; See also, H. Gamble, 'Responsiveness of the Legal System to Change' Paper delivered to the 47th Annual ALTA Conference, Brisbane, 9-12 July 1992.

⁵²⁸ For three very popular accounts of recent management theory and practice see e.g., T. J. Peters and R. H. Waterman, *In Search of Excellence: Lessons from America's Best-Run Companies*, (1984) (Sydney, Harper & Row); T. J. Peters, *Thriving on Chaos* (1991) (New York, Harper and Row); R. H. Waterman, *the Renewal Factor*, (1987) (London, Bantam Press).

plate. The Small Claims Magistrate should be a 'senior partner'⁵²⁹ in determining policy matters, with the administrative responsibility for carrying out that policy left to Court administrators.⁵³⁰

Training of Magistrates

Despite the complex nature and variety of skills required of the Small Claims Magistrate, the training and background presently required is primarily a legal one. The necessary skills relating to conciliation, administration of a Court, and so on, are left to be 'learned on the job'. Thus, Magistrate Hemming reflected that he had 'grown with the job' and gradually developed the inquisitorial skills required of a Small Claims Magistrate.⁵³¹ That he had to 'learn on the job' as opposed to receiving any specialised training in mediation and alternative dispute resolution methods is regrettable. So too, is the fact that the heavy work demands have not made it possible to receive additional and formalised training even now. In fact, despite having been a Small Claims Magistrate for over two years, Mr Hemming has yet to be sent to a conference to discuss and share his experiences with counterparts on the mainland.

Various writers have commented on the isolation of the Small Claims judge.⁵³² This isolation is even more pronounced in small jurisdictions like Tasmania, where there is only one Small Claims Magistrate. Suffice it to say here⁵³³ that more training and regular contact between Small Claims Judges is vital.

The vast majority of Small Claims cases in Tasmania have been heard by Mr Hill and his successor Mr Hemming. The comments here are limited to their background, but generally all the Magistrates' (full and part-time) training was confined to that experienced as a result of their legal background, whether in private practice or working for the Crown. Few Magistrates, if any, had

⁵²⁹ See Gamble, *op. cit* citing McGarvie, *op. cit.*.

⁵³⁰ D. J. Saari, 'Separation of Powers, Judicial Impartiality and Judicial Independence: Primary Goals of Court Management Education', cited in Gamble at 4, cited in McGarvie at 250.

⁵³¹ Personal Communication with Mr Hemming, *op. cit.*.

⁵³² See Borrelli, *op. cit.* 298; J. G. Frierson, 'Lets Abolish Small Claims Courts' (Fall 1977) 16 *The Judges Journal* 19-20; T. N. McFadgen, 'Dispute Resolution in the Small Claims Context: Adjudication, Arbitration, or Mediation?' unpublished LLM thesis, Harvard University, 1972, at 28-29.

⁵³³ The issue of training is discussed in more detail below.

training in conciliation/mediation techniques necessary for a more inquisitorial style of hearing.

Mr Hill⁵³⁴ described his background prior to becoming Tasmania's first full-time Small Claims Commissioner:

Immediately prior to my appointment as Commissioner in August of 85, I had been head of the legislation and policy division of the Law Department for about 18 months and I had a fair bit to do with the drafting of the original legislation to establish a Small Claims Court in Tasmania. Prior to that, up to the end of 1983, I had been in private practice so I had that background and a lot of the areas of Small Claims - contract disputes, motor vehicle accidents - were bread and butter material for me when I was practising law. That was generally my background.

Mr Hill also described the training he received for his new role:

I had the opportunity to go to the mainland for a week to observe the Small Claims systems in Victoria and NSW. In NSW I actually sat in with the Commissioner for a couple of days. I also had a day sitting in on the Victorian Small Claims Tribunal which is closer to the Tasmanian model. At the end of that week I attended a meeting of the Victorian referees. They met regularly to discuss their cases, the orders made, and techniques used. It was really interesting. . . That was the only training I had apart from my legal background which was mostly criminal. I certainly had no experience or background with mediation.⁵³⁵

534 Personal communication with Magistrate Hill, *op. cit.* .

535 *Ibid.*

Mr Hemming, because of the time-demands of the position, did not have the opportunity to visit other states or to attend conferences with his Small Claims counterparts in other jurisdictions. However, he did believe that extra-training, beyond legal qualifications, would be beneficial:

I think the job of a Small Claims Magistrate clearly requires legal qualifications. There can be no doubt about that because you have to make decisions that involve the interpretation of contracts and tortious liability. . . I guess it would have also helped to have worked in the civil area but I don't think it is essential. In terms of the dispute settling function, I myself, would think the decision could benefit quite clearly from exposure to whatever courses were available in the area of psychology or social psychology, or something, along those lines. Other aspects of arbitration are commonsense. I do think you can expose that person to the sorts of competing pressures that he is likely to meet in the people he is dealing with. You won't get that sort of training in a formal legal situation. It is the same situation with a general practitioner; you can only learn on the job when you deal with clients. You can take the attitude that your clients are your bread and butter and your money. That's all they are. Or, you can take the attitude that you want to understand at least what they are talking about and to do that you have to have a bit of understanding of human nature. Some training could be useful, whereby we could be exposed to whatever was on offer in terms of understanding human nature a bit better.

Mr Hemming also pointed to the need for more training in mediation/conciliation and to the fact that special skills are required.

Among the areas which might be part of such training in mediation are: knowledge of mediation and negotiation theory; the process of mediation; substantive and procedural contexts of mediation; the analytical, communication, organisation and interpersonal skills involved in mediation; attitudes, values and ethics.⁵³⁶

Finally, the preparation of a bench-book, especially for part-time Small Claims Magistrates would be a useful mechanism to train and educate part-time Magistrates about their role as a Small Claims adjudicators and to ensure that procedures remain consistently uniform and of a high standard.

Increased Number of Magistrates

As presently structured, Tasmania is served by one full time Magistrate, Mr Hemming. Mr Hemming, however, is assisted, especially in motor vehicle cases, by part-time Magistrates in each region. For non-motor vehicle claims, however, Mr Hemming must travel regularly to the North and Northwest to conduct hearings. The efficiency and desirability of this arrangement is questionable. When one takes into account the loss of time, the expense, and human 'wear and tear' on the Magistrate it would seem more efficient to appoint another Magistrate in the North, at least on a part-time basis, to handle the cases which presently must be heard by Mr Hemming. This would enable the Court to be more responsive to the needs of the Northern part of the state and free Magistrate Hemming from the burden of travel which he must presently undertake.

The Magistrates who were interviewed generally agreed that part-time Small Claims Magistrates were needed, especially for the north of the State, to save the one full-time Magistrate from having to travel.

As stated by Magistrate Hill:⁵³⁷

⁵³⁶ See D. A. Cruickshank, 'Training Mediators in British Columbia: Moving Toward Competency-based Training' (1989) 7 *Journal of Professional Legal Education* 23, 24; L. Fisher, 'Third Party Neutrals--Issues in Training' (1991) 2 *Australian Dispute Resolution Journal* 12. See generally, New South Wales Law Reform Commission Report, *Training and Accreditation of Mediators* (1991) (LRC Report 67); E. D. Green, 'A Comprehensive Approach to the Theory and Practice of Dispute Resolution' (1984) 34 *Journal of Legal Education* 245; Alberta Law Reform Institute, *Dispute Resolution: A Directory of Methods, Projects and Resources* (the Institute, Edmonton, 1990).

⁵³⁷ Personal Communication with Magistrate Hill, *op. cit.* .

[I]t seems to me that if you had a person occupied a day a week to wander around the North (doesn't matter if Burnie, Devonport or Launceston), you could do about 6-8 of these cases a day, - at least the simple ones. This would prevent a backlog from building up and if you have some forward planning about estimated hearing times you can keep time loss at a minimum. Your full time person would thus only come up on a needs basis and you could keep the backlog under control. But the recommendation was never acceptable, whether because of the cost, (worked out some costs and it was insignificant) but it never worked out and the Magistrates were seen as the backstops to the Commissioner. That didn't prove to be effective in my view. The Magistrates took it on themselves to say we will only do motor vehicle cases, which, while they are the greatest part of the volume, are the easiest in my opinion. They usually take up to an hour at most, usually only a half an hour and you can turn them over at 6-8 a day. So Magistrates came in on a limited basis. I still can't understand why they don't have a person in the North.

Magistrate Burn-out

Both present and past full-time Magistrates and several of the part-time ones spoke of the exhausting nature of the position.⁵³⁸

Repeating the comment made by Magistrate Hill:⁵³⁹

538 Similarly Weller and Ruhnka, *op. cit.* 18, found that 'Most judges we interviewed felt that one week was about optimum for Small Claims duty as many felt that Small Claims trials were "harder" or "more of a strain on a judge" than criminal or regular civil cases.'

539 Personal Communication with Magistrate Hill, *op. cit.* .

I found the job, quite frankly, the most exhausting experience I have had - that's counting criminal appeals or any jurisdiction I have been involved with. At the end of the day in Small Claims I was absolutely exhausted.

The issue of 'burn-out' was not capable of detailed investigation in the present study, however, it is something which requires careful monitoring and further study in order to determine the best strategy to alleviate the problem.⁵⁴⁰ It cannot be stressed enough that the flexibility of the Magistrate to do what is necessary to do justice in a particular case will be seriously compromised if the case load burden is so great and delays in hearings so long that the overworked Magistrate is encouraged to sacrifice fairness to efficiency.

Research Assistance

One way to help alleviate the stress of the Small Claims Magistrate is to provide further assistance, especially in regard to legal research. As noted in earlier chapters, small claims are not necessarily simple claims, and both Mr Hill and Mr Hemming favoured, for example, the use, on a voluntary basis, of law students, who could assist the Magistrate in legal research, help to keep legal materials up to date, and assist with investigations.⁵⁴¹ The Chief Court Administrator agreed that law students could provide some useful research assistance to the Court. The implementation of such a proposal is presently under consideration.

Volunteer Lawyers as a Possible Resource

Given the fact that lawyers presently serve in a number of voluntary capacities, for example the Hobart Community Legal Service, one possibility for increasing the number of Small Claims adjudicators, or at least easing the burden of the heavy case load carried by the full time Small Claims Magistrate, is to utilise adjunct lawyers to assist in Small Claims. Such a proposal has been tried with success in the United States.

⁵⁴⁰ For example, one solution might be the periodic rotation of Magistrates.

⁵⁴¹ One by-product of this research project is that such a scheme is now being considered and a few students have assisted Mr Hemming on some Small Claims cases.

Realising that Courts were faced with the problem of dwindling resources and expanding workloads, the National Institute of Justice⁵⁴² in the United States funded a pilot project exploring the use of lawyers by Courts to supplement judicial resources. As part of this project, adjunct lawyers were utilised in a wide range of capacities from conducting settlement conferences to the conduct of hearings. Six States further experimented with the use of adjunct volunteer lawyers. The evaluation of the project was that

the use of lawyers in this way can improve the Court's ability to service the public. Judicial adjuncts can reduce case backlogs when used to perform judicial duties or other functions that consume judicial time, or to conduct procedures to resolve cases that would otherwise come before the Courts.⁵⁴³

The study further reported that there the quality of decisions by adjunct lawyers was high and perceived to be so by the disputants.

6.13.11 Enforcement and Collection of Judgments

Though collection of judgments represented a comparatively minor problem in Tasmania, those who had difficulty with collection were extremely critical of the Court's role. It is important that collection procedures be an integral part of the Small Claims process.⁵⁴⁴ Presently, however, they are segmented in part because of the attitude of Court officials and because of cumbersome provisions governing collections. Once a collection order is obtained a separate agency must levy on execution. This fragmentation provides many traps for inexperienced disputants and may serve to discourage litigants from trying to collect on unpaid judgments.⁵⁴⁵

⁵⁴² See A. B. Aikman, 'Volunteer Lawyer-Judges Bolster Court Resources' National Institute of Justice Reports (SNI 195, January 1986).

⁵⁴³ *Ibid.*

⁵⁴⁴ *Ibid* 9.

⁵⁴⁵ This was also a finding of Weller and Ruhnka, *op. cit.* 9.

Generally, the Small Claims system has been under resourced. The general impression is that staff are doing an heroic job under difficult circumstances. The researcher's own experience revealed a problem in this regard. One by-product of the lack of resources is that insufficient time exists to coordinate policy statewide. For example, interviews with the Burnie district registrar revealed that it was Court policy, before initiating more expensive execution orders, to send a letter from the Court to the judgment debtor, demanding payment and threatening to take more formal execution procedures if necessary. This system apparently resulted in a very high compliance rate and represented a considerable cost/time savings for the parties and the Court. However, as I discovered in the case of my own case before the Small Claims Court, no such policy existed in the Hobart registry.⁵⁴⁶

Court administrators⁵⁴⁷ and the Justice Department⁵⁴⁸ acknowledged the need for and desirability of common policies. Unfortunately, at the time of interview, it had been years since there was such a statewide meeting. Happily, a meeting was being planned in the near future. There was also a general perception that more statistical information was needed regarding the operation of Small Claims.⁵⁴⁹ Again, this highlights the need for a detailed procedural manual and for Small Claims registrars and other Court personnel to meet on a regular basis to plan and coordinate -- to share experiences and solve common problems.

6.13.12 Small Claims Courts and Information Technology

Because the Small Claims Court has had to handle a large volume of civil cases which in turn must be processed through the system without delay, serious attention must be given to the issue of Court administration and information technology. This is yet another area which requires an expertise and coverage which is beyond the scope of a general evaluation, nevertheless, the broad

⁵⁴⁶ After informing Mr England of this matter, the Burnie practice has since been adopted throughout the State.

⁵⁴⁷ Personal communication with Mr David England, *op. cit.*

⁵⁴⁸ Personal communication with Mr Peter Maloney, *op. cit.*

⁵⁴⁹ The difficulty of achieving uniformity in enforcement procedures is a commonly reported finding. See eg. Iowa Study, at 467 ('In addition to different instructions, several litigants and clerks mentioned that an inconsistency in procedures and forms existed across counties.').

parameters of the role of technology and the Small Claims Court require at least brief discussion. Unfortunately, while both the past and present Hobart Small Claims Registrar are keen advocates of greater use of technology to administer the Small Claims Court, the central administration is not as enthusiastic. Below is a discussion of some of the areas in which information technology could help improve the administration of the Small Claims Court.

Court Records

Almost all of those interviewed acknowledged the need for better and more complete records regarding Small Claims. For example, at the time of interview, there was no record of personnel costs specifically related to Small Claims. This is in large part due to the fact that the Small Claims is a division of the Magistrates Court. However, plans are being made to significantly computerise the system so that more information is available. Just to take one example from Mr Hamilton:⁵⁵⁰

Yes, computerisation would be most helpful because we get a lot of letters coming in of the type, "how's my action going against such and such against Joe Bloggs" . . . You look up Joe Bloggs' file and you can't find it because they didn't sue Joe Bloggs. . . . The computer information on the data bases would access that information much more quickly for you. It's very intensive dealing with correspondence because most people are not trained to draw out the relevant facts to identify files. You are always going on a small excursion before you can enter into the correspondence so a computer would help there.

Each region keeps records of files and knows at any point in time how many cases have been filed and disposed of. The North and Northwest regions utilise a card filing system which contains the names of the parties and whether the matter is a contract, motor vehicle or other type of dispute. However, this system is not utilised in Hobart. As the Chief Court Administrator⁵⁵¹ noted:

⁵⁵⁰ Personal communication with Mr Barry Hamilton, *op. cit.*

⁵⁵¹ Personal communication with Mr David England, *op. cit.*

We haven't put in place, but we should, a general reporting system so that each month or three months we can automatically get a list from each area to be collated as to how many cases have been lodged and dealt with.⁵⁵²

In short, the record keeping and statistical functions of Small Claims should be reviewed with the benefits of computerisation, which now exists in upper Courts, extended to Small Claims where the volume of cases, and need for speedy resolution of disputes is paramount. Such a computer system should capture data on each case from the time of filing. This would give Court administrators almost limitless indexing capabilities, available on demand, to expedite Court calendars, scheduling, file retrieval, and statistical reporting.⁵⁵³ Moreover, the Court would be better able to conduct ongoing evaluations of its operations and respond more quickly to enquiries.⁵⁵⁴

Magistrates' Menu

Another area in which technology could improve the efficiency and responsiveness of the Small Claims system is in providing assistance to the Magistrate. For example, many judges in other jurisdictions now have a computer on their desk in which the judge uses primarily for word processing and spread sheet capabilities as well as case management. Blackstone, a case management system is presently utilised at the upper Court level, but should also be extended to Small Claims. In fact, in conducting the file survey as part of the present study, a large amount of data has already been captured and has been utilised by the Court to provide statistics on a wide range of matters which previously would have required someone to go through each file manually. Even a stand-alone personal computer would enable the Magistrate to draft

⁵⁵² J. Bennett, Tasmanian House of Assembly, 'Second Reading, Court of Requests (Small Claims Division) Amendment Bill 1986, (Hansard) No. 3, 19 March 1987, at 622. Fortieth Parliament - Second Session 1987.

⁵⁵³ See generally, J. F. Weis and G. Bermant, 'Automation in the Federal Courts - Progress, Prospects and Problems' (Fall 1987) *Judges Journal*; Administrative Office of the US Courts, *Long Range Plan for Automation in the United States Court, Fiscal Year 1991 Update* (1991) (Washington, D.C., US Government Printing Office).

⁵⁵⁴ See generally, B. Krevitt Eres (ed), *Legal and Legislative Information Processing* (1980) (Westport Connecticut, Greenwood Press).

opinions, call-up previous written opinions which might be useful in the present case, perform computations and other statistical functions, compile statistics and so on.

Networking

Another important use of technology is networking, especially electronic mail. Via an electronic network, a Small Claims Magistrate could be in regular communication with other Magistrates around the State, throughout Australia, and even all around the globe. This would greatly facilitate reforms and the rapid emulation of the best practice. Moreover, it would greatly reduce the isolation which presently characterises Small Claims Magistrates in Tasmania.

Within the State, a common network would ensure that Small Claims policies were consistently and uniformly being applied in all regions of the State. Through a national and international network, Small Claims Courts and Tribunals everywhere could foster common research projects and data which are useful on a wide scale.

Improving Access to Information about Small Claims Court Procedures

Many jurisdictions in other Courts have also begun to make use of touchscreen interactive computers to lighten the load of staff who are forced to answer the same questions and free them for other tasks.⁵⁵⁵ For example, in the Colorado⁵⁵⁶ Small Claims Court the State Justice Institute funded a pilot programme of this type. Upon entering a private area, the party sees a screen which offers a language choice of English or Spanish. After touching the screen to indicate the choice, the litigant is led through a step-by-step process to explain the system. Vocal instructions also reinforce the words on the screen.⁵⁵⁷ Other systems have had great success in using such a system to 'walk' a litigant through the filling in of a form. Most systems also usually incorporate a printer so that the viewer can obtain a hard copy of what they have viewed.⁵⁵⁸

⁵⁵⁵ See Justice A. Graham and J. Townsend, *Information Technology USA 1991: A Report of Developments in Technology in Courts in America and Canada conducted by the Authors on Behalf of the Family Court of Australia* (1992) (AGPS, Family Court of Australia) 25-27.

⁵⁵⁶ *Ibid.*

⁵⁵⁷ *Ibid.*

⁵⁵⁸ *Ibid.* Similar systems have been utilised with success in the US Bankruptcy Court

Requirements for Successful Implementation of Technology

The introduction of new technology leads naturally to the question of resources. Four essentials are required for the successful implementation of new technology in Court systems: money, people, cases and time.⁵⁵⁹ Obviously, the development and inclusion of a new case management system or other technology requires an initial investment of money. Given the existing state of Tasmania's economy, this first essential is likely to be a real stumbling block. A second pre-condition is the existence of a legally oriented system analyst to design an effective system.⁵⁶⁰ In Tasmania's case, the researcher has engaged the Computer Science Department of the University and the existence of several Honours students who were looking for a major project to donate some resources to this area. With luck, this project will be under way in 1993. Another aspect of the people requirement is the willingness of existing Court staff and Magistrates to learn to use the system. The third requirement is cases, ie the necessary work load which requires information technology to handle it better. Given the rapid growth in the number of cases handled by the Small Claims Court, this is one criteria which can certainly be met. The final requirement is the necessary time to permit the system to be put into place.

Finally, Tasmania should be supporting national efforts to coordinate the development, purchase and implementation of new technology in such a way that systems are compatible. Unfortunately, the experience of many countries is that different systems are often incompatible, a feature which defeats the immense gains to be achieved through networking, common training programmes and other joint activity.

559 J. McMillan, National Center of State Courts, Williamsburgh, Virginia, quoted in Graham and Townsend, *op. cit.* 13.

560 A shortage of such people is a major reason for the slower than expected adoption of new technology by the legal profession. See P. Leith, *The Computerised Lawyer: A Guide to the Use of Computers in the Legal Profession* (1991) (London, Springer-Verlag) 140.

6.13.13 Evaluation

The Need for Evaluation

Related to the need for better information, all of those interviewed⁵⁶¹ cited the need for systematic evaluations of the Small Claims Court to measure the extent to which the system was working to achieve its goals.

Evaluation Strategies

Mr Viney,⁵⁶² the Burnie District Registrar, further cautioned about the need for statistical measures needed to be simple enough so that they would actually help improve the system rather than imposing a further burden on an already overworked system.

It is important, also, that an evaluation not be seen as an end in itself. Rather, regular and systematic evaluation should be an integral part of sound judicial administration. This does not mean that the Small Claims Court undergo a comprehensive 'total program' evaluation each year. Rather, a major aspect of Small Claims administration should be reviewed each year so that in a given cycle, say five years, the entire system is reviewed.⁵⁶³ Further, perhaps an evaluation project team should be considered to develop and implement strategies adopting a consultative style⁵⁶⁴ involving all the stakeholders who are consulted regarding the necessity, workability, and desirability of the evaluation.⁵⁶⁵ Hopefully, the results and recommendations of the present study will constitute the first step in developing such a systematic and on-going evaluation of the Tasmanian Small Claims Court which will ensure that it will continue to be responsive to those for whom it is designed.

⁵⁶¹ See e.g., Summary of Interviews, Mr Peter Maloney, Mr England, *op. cit.*

⁵⁶² Personal communication, 16, March, 1990, See Summary of Interviews, *op. cit.* s 4.

⁵⁶³ See B. Caldwell, *The Self Managing School* (1988) (Sussex, Falmer Press) (Though this particular application refers to a school, the evaluation principles discussed are equally applicable to a Court); see also A. J. Love, *Internal Evaluation: Building Organizations from Within* (1991) (Newbury Park, CA, Sage Publications).

⁵⁶⁴ See e.g. W. Soden, 'The Delay Reduction Project an Exercise in Future Planning,' (1990) (South Carlton, Victoria, Australian Institute of Judicial Administration) 10.

⁵⁶⁵ E. N. Goldenberg, 'The Three Faces of Evaluation' (1983) 2(4) *Journal of Policy Analyses and Management* 515-525.

6.13.14 Summary

The Small Claims Court at present appears to have limited contact with other organisations which also act to facilitate dispute resolution. However, it is important that a close working relationship be maintained with such other organisations so that in appropriate cases referrals can be made.

The majority of those interviewed felt that the jurisdictional limit of the Small Claims Court should be increased. They also recognised that this would entail a corresponding increase in the jurisdiction of the Court of Requests. However, most of those interviewed would like the subject-matter jurisdiction of the Small Claims Court to remain the same.

There was also support for the need to investigate the prospect of class actions or grouped proceedings and the relevance of such procedures for Small Claims.

While there have been periods in its operation where the delays between the time of filing and hearing a claim have been too long, the Tasmanian Small Claims Court generally rates highly on this issue. Presently, the time for delay between the filing and a claim and hearing date is approximately 30 days. This is a considerable improvement over the average delay revealed in the file survey which showed that during the fiscal year 1988-89 the average delay was approximately 120 days. Nevertheless, it is important that the Court regularly monitor its scheduling practices and continually try to improve upon its performance.

The existing Small Claims brochures was viewed as generally helpful, though it could be improved by providing more information about other dispute resolution avenues and further details of Court procedure and the availability of legal advice.

Most Court forms could be improved with further attention to form design and simplicity of language. Also, more attention should be focused on the informational needs of respondents.

While Court Staff were viewed as helpful by the vast majority of disputants, still more could be done to improve the kinds of information and assistance given regarding all aspects of Small Claims.

No formal training exists for Small Claims Court staff. Instead, most staff have learnt their roles and responsibilities on-the-job. This includes Registrars and other Court staff who are now conducting conferences.

The training and qualifications of Small Claims Magistrates is primarily in law. No Magistrate had received any formalised training in mediation, settlement, etc. As with Court Staff, they had to learn on-the-job. The present full time Small Claims Magistrate, during his two years in the position, has not been sent to a Conferences or workshop in order to share his experiences or learn from the experiences of other Small Claims Magistrates on the mainland.

There is a concern about 'job burn-out' and both the previous and present full-time Magistrate commented on the physical, mental and emotional strain of deciding so many cases which, because of the nature of the dispute, the lack of legal experience and highly emotional involvement of the parties, can be highly complex.

Most of those interviewed acknowledged the need for a permanent part-time Magistrate in the Northern region of the state, which would eliminate the travel and time burdens on the full-time Magistrate for Small Claims. Student research assistance was also viewed as offering the possibility of much needed assistance to the Small Claims Magistrate.

The need exists for better and more complete records regarding Small Claims. Computerisation was seen as playing a pivotal role in improving the record keeping, decision making and evaluative functions of the Small Claims system.

Small Claims staff and Court administrators have met infrequently to discuss procedures and possible problems. As a result, policies have not always been uniform and the benefits of such collaboration and regular consultation have not been achieved.

Administrators, Court staff, Magistrates and supporting groups recognised the importance of regular and systematic evaluation of Small Claims in order to

monitor the extent to which the Court is fulfilling its goal of providing for the speedy, informal and inexpensive resolution of minor civil disputes.

Chapter 7

IMPLICATIONS AND RECOMMENDATIONS

Having summarised the major findings, this chapter discusses the major implications of the findings and the recommendations which flow from them. In presenting these implications and recommendations (R), three caveats are necessary. First, it must be stated that a number of the recommendations made here have already been adopted in whole or part, since the date of the study. This simply reflects the reality that institutions, such as Courts, are continually changing. Secondly, the very act of conducting an evaluation of the Small Claims Court has in the process led Court officials and administrators to examine their own practices and make changes in response. A good example of this is the researcher's discovery of the procedure in the Northwest region of the State of sending a demand letter to the judgment debtor prior to undertaking the costs of any formal execution procedures. When this was brought to the attention of the Chief Administrator of Courts, the practice soon became Small Claims policy throughout the State. Finally, the researcher, in making recommendations, is not suggesting that all of the changes suggested below are possible or necessarily workable. The recommendations of this study, like other studies, to some extent assume the ideal; yet Court officials with limited resources and multiple demands on their time must dwell in the 'real'. These limitations, notwithstanding, it is hoped that Court officials and policy makers find in the recommendations some valuable suggestions about how the Tasmanian system might be improved.

7.1 Philosophy and Purpose of Small Claims

R 1. While the goal of providing for the inexpensive, informal and expeditious resolution of minor civil disputes is largely being achieved, the primary role which the Tasmanian legislation gives to settlement must in practice and policy receive more emphasis.

7.2 Access

7.2.1 Physical Aspects

R 2. All Small Claims facilities should be gradually upgraded and redesigned to take into account the special features of Small Claims Courts. In terms of layout and degree of formality the Hobart Court should be utilised as a model.

R 3. Court buildings should be clearly signposted inside and out. 'Small Claims' should be readily identifiable from the street. Adequate signs should also be placed inside the building to identify the correct room, eg 'Hearing Room', 'Waiting Room', 'Small Claims Registry'.

R 4. Bus shelters and community notice boards should also contain telephone numbers, information about, and directions to the Small Claims Court and Registry.

R 5. Where possible, notice signs should be placed at counters informing disputants that a private room for further discussion is available upon request. In any case, staff should be trained to offer the facilities of a private room whenever it is requested or when confidential personal or money matters are to be discussed.

R 6. Waiting rooms should be made more convenient by ensuring adequate lighting, reading material, posters etc.

R 7. Where possible separate waiting rooms should be provided for Small Claims disputants, including separate rooms for claimants and respondents.

R 8. At least one public telephone should be made available.

R 9. Tea and coffee should be provided where possible. At the very least, a hot drinks machine should be installed.

R 10. Staff training should be provided to make them more aware of and sensitive to disputant needs. For example, it should be standard practice to ask

disputants to inform the Court of any special needs, for example interpreter services, child care, names of independent assessors and so on.

R 11. The Small Claims Court should, as a pilot program, consider sitting periodically (e.g one day a month) in areas of the State which appear to be underrepresented such as the lower socio-economic neighbourhoods and rural districts.

7.2.2 Adequate Information and Advice about Small Claims

R 12. A complete range of up-to-date literature on Small Claims should be readily available and prominently displayed. Such literature should also be regularly available and distributed to important community groups to whom people might come for legal advice.

R 13. The Registrars, Magistrates or other knowledgeable Court officer should be given the responsibility and time to speak to community groups about Small Claims. This and other publicity should specifically target the groups which appear to be under-represented before the Court, ie those from a lower socio-economic background.

R 14. All Courts should have publicly displayed information regarding availability of interpreters, legal aid and other legal and financial counselling referral services.

R 15. Court administrators should investigate the feasibility of preparing a 'Small Claims' instructional video which can be checked out to disputants (upon the payment of a small deposit) and utilised in educating the public about Small Claims. Another possibility is the development and use of touchscreen interactive computers which can educate litigants about Court procedure and guide them through the filling in of forms.

R 16. All Court forms and other documents must be written in plain English and designed so that they are easy to understand and complete.

R 17. The brochure given to claimants requires further detail and revision to make it easier to read. More specifically, the brochure should contain:

- More information regarding 'alternatives' to Small Claims. An important part of this information is the importance of separating debt-collection problems from genuine legal disputes.
- Parties must be informed of the true costs of pursuing a small claim, ie that they must initiate the action and prepare their own case, have limited rights of appeal, possible enforcement problems, may have to take-off work at their own expense, etc. The existing brochure makes many of these points, but, in the researcher's view, they require more emphasis so that disputants know what to expect and not to expect from Small Claims.
- More information should also be provided regarding the availability of free legal advice.
- It should be made clear that if the amount in controversy is above \$2000, a disputant can elect to forego part of their claim in order to come within the Court's jurisdiction.
- More attention should be given to a description of available amenities, including the availability of parking, buses, interpreters, telephones etc. Perhaps this could be done on a separate handout to be given at the hearing or with the greater use of posters.

R 18. Consideration should also be given to the design of a separate brochure for respondents. Presently, the brochure is provided only to claimants. However, both parties receive a one page notice with brief instructions to the claimant on the front and to the respondent on the back side. Also, the claim form should indicate the availability of a brochure about Court procedures. Given the fact that the claimant

has also had the benefit of the brochure, the sum total of information provided favours the claimants. The brochure for respondents should stress the importance of: attempting to settle the dispute without the necessity of a hearing, showing up to discuss settlement or defend the claim, bringing along all receipts and other relevant documents, and arranging for the appearance of witnesses, etc. The respondent's brochure should be posted to respondents when they are sent the notice of claim.

R 19. Court administrators should investigate the feasibility of utilising law students and other volunteers to provide free legal advice regarding small claims disputes.¹

7.2.3 Financial Barriers to Access

R 20. While it is important to keep the filing fee costs as low as possible, it is also important to periodically review costs to take inflation into account.

R 21. A procedure should be adopted in the legislation allowing for a waiver of costs when claimant circumstances justify it.

R 22. To alleviate the costs associated with having to take time off from paid employment, Saturday and evening sessions should be piloted. For example, Small Claims sittings for one evening a fortnight and one Saturday a month might be introduced for a trial period.

7.2.4 Procedural Barriers to Access

R 23. The Registrar should be granted the power to grant, upon sufficient justification shown, an adjournment requested by either disputant. However, any subsequent requests for an adjournment should be approved by the Magistrate.

¹ Some jurisdictions in the U.S. have appointed an independent ombudsman to assist disputants, publicise the Court's existence and investigate complaints. However, given present government resources, that would not be a practical alternative for Tasmania. See W. DeJong, *Small Claims Court Reform*, (1983) (Washington, D.C., National Institute of Justice) 8.

R 24. Court staff and Magistrates should receive special training regarding the need for 'verbal and written signposts' and other communication skills to ensure that disputants know what is expected of them at every stage of a Small Claims proceeding.

R 25. The use of procedural cards, such as employed in other jurisdictions should be trialed. Court staff and Magistrates should receive training specific to the needs of Small Claims Court which highlights the importance of verbal and written 'signposts' to ensure that disputants know what is expected of them at every stage.

R 26. Techniques for giving evidence at a distance and out of State require facilitation and further research.

R 27. More use should be made of Registrar's Conferences to ensure that disputants are properly prepared for their hearing.

R 28. Research should be undertaken and consideration given to the necessity and desirability of a representative or class action in Small Claims Court.

7.3 Consumer Participation

R 29. The Court should consider the establishment of a Small Claims Consultation Committee representing, for example, consumer groups, traders, insurance companies, lawyers, legal advice centres, Court staff and judiciary. Such a Committee would help ensure that the Court remains responsive to community needs. It would also help to reduce misconceptions which can otherwise occur between different groups. For example, some consumer groups presently have the mistaken belief that the Small Claims Court is a 'Consumer's Court' and a Tribunal as opposed to a Court. At the same time, some Court officials are under the impression that the Small Claims Court is no different than any other Court in the system. In short, the Tasmanian community requires a clear vision regarding the goals and purpose of the Small Claims Court.

7.4 Jurisdiction

R 30. The subject matter jurisdiction of the Small Claims Court should remain the same, however, the jurisdictional amount should be increased to take inflation into account and to bring Tasmania in line with similar changes in other States. Such an increase, however, will also have to be accompanied by an increase in the jurisdiction of the Courts of Requests.

R 31. If motor vehicle accident cases continue to increase as a percentage of the total number of cases filed in Small Claims Court, then further research is warranted to investigate the feasibility and desirability of a separate Court/Tribunal and/or procedure specifically designed to facilitate the resolution of such disputes.

R 32. Regular consultation with the insurance industry should be undertaken to ensure that insurance disputes are handled expeditiously, while at the same time not having a 'chilling' effect on access to the Court by other groups in society. If the Court is to retain its role as a Court for the resolution of small claims of a general nature and available to all the community, the Court must be wary lest it be 'captured' by a particular interest group, whether insurers, consumers or others.

7.5 Settlement

R 33. If settlement is to continue to be the primary aim of Small Claims, then more effort must be expended to facilitate this function. The increased use of Registrar's Conferences as well as other mediation alternatives such as the use of volunteer lawyers should be explored.

R 34. More community education is necessary to inform the public that settlement of disputes is the primary role of the Small Claims Court.

R 35. In recognition of the symbiotic relationship between Small Claims and other dispute resolution mechanisms, more must be done to facilitate a close working relationship between the Small Claims Court and such agencies as Legal Aid, Consumer Affairs, Community Advice Services, etc. The

implementation of a Consultation Committee (R 28) would facilitate such a process.

R 36. Magistrates and Court staff should receive specific training regarding settlement and mediation. Among the specialised skills² which should receive attention are:

- encouraging a collective approach to problem solving
- enabling parties to test out ideas and suggest compromises
- providing information to make responsible choices
- expanding disputants' views of possible solutions, realistic expectations
- assisting parties to achieve relationship closure
- providing structured approach to problem solving
- reinforcing commonly held views and understandings reached
- helping parties to define what is reasonable
- encouraging parties to understand the other's motivation
- exploring effect of making concessions and accommodations
- focusing on basis of a continuing relationship
- encouraging parties to identify the underlying relationship problems
- increasing commitment to mutually reached decisions
- opening up alternative options
- de-escalating the conflict
- reinforcing straightforward, honest statements

² Adapted from P. Mark, 'The Registrar and Court Counsellor's Role in Conflict Resolution' in J. Mugford (ed), *Alternative Dispute Resolution* (July 1986) (AIC Seminar: Proceedings No. 15, (Canberra, ACT, Australian Institute of Criminology).

- banning blaming and manipulation
- challenging discrepancies, game-playing and distortions
- focusing on joint problem solving
- developing problem solving skills
- emphasising solutions which work
- dealing with power imbalances
- dealing with recriminations and punishing behaviour
- identifying shared aims
- clarifying problems and issues between the parties.

The mediation training should also involve theoretical underpinnings of negotiation skills such as those highlighted by Fisher and Ury,³ as well as some exposure to conceptual frameworks such as Folberg and Taylor's⁴ seven stage conflict resolution.⁵

R 37. More research is necessary regarding the efficacy of Registrar's Conferences as well as the Magistrates' attempts at settlement.

R 38. More research is required on issues of empowerment and the nature and effect of legal language when utilised in a Small Claims Setting and.

R 39. This study focused on the performance of the institution of the Small Claims Court, while taking into account the understanding of disputants of various components of the system. Future studies, however, should examine

³ R. Fisher and W. Ury, *Getting to Yes* (1983) (New York, Penguin Books).

⁴ See J. Folberg and A. Taylor, *Mediation - A Comprehensive Guide to Resolving Conflicts Without Litigation* (1984) (San Francisco, Jossey-Bass). (The authors posit the following 'seven-stage conflict resolution process'

1. Introduction--creating trust and structure
2. Fact finding and isolation of issues
3. Creation of options and alternatives
4. Negotiation and decision making
5. Clarification and writing a plan
6. Legal review and processing
7. Implementation, review, and revision (at p 32).

⁵ See generally, J. Z. Rubin and B. R. Brown, *The Social Psychology of Bargaining* (1975) (New York, Academic Press); J. Rojot, *Negotiation: From Theory to Practice* (1991) (London, Macmillan).

the psychological attitudes of the disputant's themselves which predispose a litigant to favour mediation or adjudication.⁶

7.6 Court Staff

R 40. Court staff should receive training which is specific to Small Claims and which takes into account the special problems encountered by disputants who are conducting their own cases. While the present study points to a number of areas requiring improvement, a needs assessment should be conducted and piloted to determine the nature of the training required.

R 41. A Small Claims Procedural Manual should be developed for Court staff so that they know what is expected of them and will be better able to perform their duties consistently and efficiently. This training should include, for example: the definition of a 'small claim'; where to draw the line between information and legal advice; information regarding forms and how to complete them; specific details of their position and how it relates to the Small Claims process as a whole; an awareness of the Small Claims legislation; awareness of and sensitivity to the special needs of *pro se* disputants, client contact skills for counter staff, and so on. One substantial aid to such training is the development of a procedural manual to assist in the training of new staff and to ensure consistency of operations amongst existing staff.

7.7 Magistrates

R 42. A coordinated and comprehensive training program for all Magistrates should be introduced. Part of this training should include in-depth training in mediation and conciliation techniques and specialised training regarding the skills of eliciting facts and dealing with *pro se* disputants.

R 43. The full-time Magistrate should attend a conference at least once per year in order to reflect upon and share experiences and ideas with colleagues on the mainland and overseas. This is vital if the Tasmanian Small Claims Court is to

⁶ See R. L. Wissler, 'Disputants' Assessments of the Process and Outcomes of Mediation and Adjudication', unpublished Ph.D dissertation, Boston University, 1986. See also G. A. McEwen and R. J. Maiman, 'Mediation in Small Claims Court: Achieving compliance Through Consent' (1984) 18 *Law and Society Review* 11.

keep abreast and take advantages of advances being made in the rapidly changing field of judicial administration.

R 44. A bench book should be developed for Small Claims Magistrates. Such a book would give consistency to Court procedures and operation. Most importantly, it will help educate part-time Magistrates regarding the special needs of Small Claims disputants.

R 45. Another permanent part or full time Magistrate should be appointed for the Northern part of the State so that the full-time Magistrate does not have to waste time and energy on travel. Such a measure would also ensure that problems with Court delay do not occur and free the Magistrates to attend to other matters such as supervising Registrar's Conferences, speaking to community groups and taking a more active role in the administration of the Small Claims Court.

R 46. A volunteer program should be established whereby Magistrates are able to receive research assistance from final year law students.⁷

R 47. More research is required regarding the problem of job burn-out and strategies should be developed to help alleviate the heavy stress which results from Small Claims work.

7.8 Administration

7.8.1 Regular meetings

R 48. Small Claims Court Registrars and Magistrates should meet regularly to monitor progress, and discuss common problems and ensure uniformity of procedures. In addition, it is important that at least one Small Claims Court administrator attend an annual national conference with their mainland counterparts. That person, in turn, should prepare a report to be distributed to those who were unable to attend. As soon as it is feasible, Small Claims Magistrates and Court staff, both Statewide and beyond, should be in regular contact with each other through electronic mail.

⁷ Such a program has received the endorsement of the Chief Magistrate and is presently being reviewed by Tasmania's Chief Justice, Sir Guy Green.

7.8.2 Rejection of Claims

R 49. A record of rejected claims should be kept and periodically reviewed to ensure consistent compliance with the definition of 'small claim' under the Act.

7.8.3 Scheduling

R 50. The Court should consider the use of special calendars based on case type, for example motor vehicle cases.

7.8.4 Record Keeping/Statistics

R 51. The computerisation of Small Claims records and forms should be undertaken, especially given the avowed aim of Small Claims Courts of providing a speedy resolution to disputes.⁸

R 52. Court records and other administrative functions should be computerised and organised so that adequate statistical information is kept regarding the performance of the Small Claims Court.

R 53. Tasmanian Court Official should also support the establishment of a national data base and electronic network so that comparative data in other jurisdictions can be utilised and Small Claims personnel in different jurisdictions can benefit from the experience and expertise of others.

7.8.5 Enforcement

R 54. It is important that uniform policies of enforcement be adopted in each region of the State. Again, administrators should meet regularly to discuss any problems which occur in regard to enforcement.

⁸ The researcher has given the Court a copy of the database which was compiled from the File Survey undertaken for this study. Already, these records, though now out of date, have been useful to aid administrators in making a range of budgetary and scheduling decisions.

R 55. The Small Claims Court should establish a close working relationship with other social service agencies so that referrals may be made regarding debt counselling, financial advice and so on. Perhaps the Registrar conferences could be utilised to help ferret out cases for which no collection is possible and refer such cases to other and more appropriate agencies.

R 56. Further consideration should be given to the desirability of a statutory provision for Court-ordered debt counselling.

7.8.6 Establishing Relationships with Other Dispute Resolution Agencies

R 57. The Small Claims Court staff and administrators should establish stronger links with other alternative dispute resolution, legal referral, and counselling agencies.

7.8.7 Regular Evaluation

R 58. Regular and systematic evaluation should be an integral part of sound judicial administration. This does not mean that the Small Claims Court undergo a comprehensive 'total program' evaluation each year. However, it is recommended that a major component of Small Claims administration be reviewed each year so that, in a given cycle, say five years, the entire Small Claims System is reviewed.⁹ Further, perhaps an evaluation project team should be considered to develop and implement strategies adopting a consultative style.¹⁰

7.8.8 Greater Responsibility Given to the Magistrates and Court Staff.

R 59. More responsibility for the administration of Small Claims should be given to the Magistrates and Court staff who are directly involved. This should

⁹ See A. J. Love, *Internal Evaluation: Building Organizations from Within* (1991) (Newbury Park, CA, Sage Publications).

¹⁰ See e.g. W. Soden, 'The Delay Reduction Project an Exercise in Future Planning,' (1990) (South Carlton, Victoria, Australian Institute of Judicial Administration) 10.

enable the Small Claims Court to be more responsive to the needs of disputants and other groups involved in dispute resolution

7.8.9 More Resources and a Long-term Commitment to Improvement

R 60. Last, but certainly not least, more resources must be allocated to the Small Claims Court. The researcher's overriding impression of the Tasmanian Small Claims Court is that the system and the people involved are doing an heroic job under difficult circumstances. Yet, policy makers must realise that better management and a responsive Court require an investment of significant amounts of time and money. It is also important that changes be viewed as evolutionary, not revolutionary. Sustained improvement in judicial systems are necessarily slow. It takes a long period of sustained time and effort to improve and maintain quality.¹¹ Accordingly, efforts should be made to ensure a long-term budgetary commitment over the next 5-10 years to fine tune what is already an excellent program.

¹¹ See generally, D. Dunphy and D. Stace, *Under New Management: Australian Organizations in Transition* (1991) (Sydney, McGraw-Hill).

Chapter 8

CONCLUSION

8.1 Introduction

This evaluative study has aimed to: describe the evolution of the Tasmanian Small Claims Court, identify the extent to which it is meeting its goals, and suggest possible reform measures. In order to understand the specific provisions of the Tasmanian Small Claims Court which was created in 1985, it was necessary to chronicle the worldwide growth and development of similar forums in other countries which have evolved to provide access to justice for the resolution of minor civil disputes. Indeed, the research and literature which has emerged from the Small Claims experience of other countries was a significant influence on Tasmanian developments. The examination of the Tasmanian Small Claims system itself relied on empirical data obtained from Small Claims disputants, Magistrates, Court staff, Court records, and personal and participant observation. Analysis of this data reveals that the Tasmanian Small Claims Court is to a large extent satisfying the purposes for which it was created, that is, to provide a forum in which minor civil disputes can be resolved impartially and in an expeditious, inexpensive and informal manner. Though the Tasmanian Small Claims Court generally is functioning well, improvements have been suggested by which the Court can be more adaptable to community needs, more accessible to lower income groups and those living outside the regional centres, more efficient in coordinating Court policies on such matters as enforcement and making use of existing technology, more effective in resolving disputes quickly and impartially, and more comprehensible in ensuring that all disputants, including respondents, understand its procedures.

In Chapter 4, various recurrent themes and issues emerging from the Small Claims literature, both in Australia and overseas, were identified and relied upon to shape the methodology for the present study. Having presented the results, analysis, and implications of the present study, it is appropriate to conclude by reflecting again on these themes in order to place this Tasmanian Small Claims Court Study within the broader framework of Small Claims research generally.

8.2 Contextual Issues Impacting Small Claims Courts and Tribunals

We turn firstly to the contextual issues which seek to define how Small Claims Courts and Tribunals fit into a wider scheme of both formal and informal dispute resolution procedures.

8.2.1 Small Claims in the Wider Context of Dispute Resolution

As a result of the increasing interest in alternative dispute resolution generally,¹ recent research on Small Claims Courts has focused attention on the relationship between formal and informal methods of dispute resolution. On a systems level, the Tasmanian Small Claims structure itself is a judicial hybrid, incorporating elements of both informal and formal dispute resolution. Registrar's conferences, an emphasis on settlement, the absence of lawyers, private hearings, and the absence of formal rules of evidence all contribute to a more informal setting than exists in traditional Courts. At the same time, there is little doubt that most disputants would find the Tasmanian Small Claims System to be very court-like: a claim must be filed; formal proof is required to support a claim; parties attend a hearing and are cross-examined under oath; and the hearing is presided over by a legally trained Magistrate who must apply the law and who has all the contempt and enforcement powers of a normal Court Magistrate. One of the most important aspects of this study is the recognition that these formal and informal features of the Small Claims Court are founded upon deeper and underlying values such as certainty, predicability, flexibility and equity which themselves are often in conflict with one another. The result is an uneasy compromise, a delicate balance, which can sometimes tilt one way or the other with the result that the aims of the Small Claims Court can be frustrated. Accordingly, systematic evaluation is necessary to monitor the mix between formal and informal aspects in order to ensure that the system has not tilted too far in one direction.

Not only is the relationship between formal and informal dispute resolution reflected in the Small Claims Court itself, but on broader scale, the study also highlights both the interrelationship between the Small Claims Court and other groups in society which assist with the resolution of disputes. The Tasmanian study supports the view that

¹ See generally, H. Astor and C. M. Chinkin, *Dispute Resolution in Australia* (1992) (Sydney, Butterworths).

the relationship between Small Claims Court and other, more informal, methods of dispute resolution is a symbiotic one. This symbiosis is well illustrated by the interview data from Consumer Affairs Officers who pointed out that often the mere 'threat' of going to Small Claims was enough to make a trader consider seriously attempting a settlement option when involved in a dispute with a consumer.

While the relationship between the Small Claims Court and other dispute resolution bodies is a symbiotic one, this symbiosis can sometimes be less mutually advantageous than it might otherwise be because the various organisations involved have different perceptions as to the proper role each organisation should play in the dispute resolution process. In other words, the socially constructed reality of Small Claims Court and the broader context of dispute resolution in which it operates was not always a harmonious or unified one. For example, the Office of Consumer Affairs was more likely to see the Small Claims Court as predominantly a Court to redress consumer grievances against traders. The Small Claims Court Registrars and Magistrates, however, emphasised the role of the Court in resolving minor civil matters generally, whether they be consumer disputes or any other type of dispute within the Court's jurisdiction. The Hobart Community Legal Service, in turn, tended to see Small Claims as the 'poor person's Court' providing an avenue for justice for those who could not otherwise afford it. These different 'visions' of the proper focus of a Small Claims Court resulted in quite different views on the Court's performance. For example, Consumer Affairs officers were of the view that the Small Claims Court should do much more to inform the public about its availability and the nature of its procedures. The present full time Magistrate and Court registrars generally saw the Court as already well known in the community.

These differing perceptions highlight the need for much more consultation and regular communication between the Small Claims Court and other groups who are also part of the dispute resolution process. Only in this way can the full benefits of this symbiotic relationship between formal and informal dispute resolution bodies be realised to the benefit of the Tasmanian community as a whole.

8.2.2 Small Claims within the Broader Context of Judicial Administration

Movement towards a Responsive Model for the Role of Courts in General and Small Claims Courts in Particular

Chapter 4 also drew on the work of Cappelletti in advocating a responsive model of Courts.² Such a model seems especially appropriate to Small Claims Courts which tend to have far more close contact with disputant citizens, who are actively involved in the presentation of their own cases. Several suggestions were made as to how the Tasmanian Small Claims Court might become more responsive to Tasmanian citizens. These included more staff training, better publicity, better brochures and more personal assistance. However, the most important recommendation was the establishment of a Consultation Committee through which various community groups might have input into the functioning of the Small Claims system.

Judicial Administration

Another theme which has emerged from the literature is that an evaluation of a Small Claims Court must be concerned with more than just what happens in the Small Claims hearing room and the outcome in a particular case. Larger and system-wide questions of judicial administration must also be considered. For this reason, issues of delay, Court forms, instructional literature, consistency of operational rules, scheduling patterns and so on have been examined and recommendations suggested regarding ways the system might be improved.

Models of Court Management: Governance of Small Claims Courts and Tribunals

On a system-wide level, this study reflects similar developments elsewhere which suggest that if the Small Claims Court is to be seen as efficient,³ accountable⁴ and responsible⁵ there is a need for judges and Court administrators to adopt a more

2 M. Cappelletti, *The Judicial Process in Comparative Perspective*, (1989) (Oxford, Clarendon Press) 113.

3 See e.g., *Report on a Review of the New South Wales Court System*, Coopers & Lybrand WD Scott, May 1989.

4 See e.g., A. Barnard and G. Withers, *Financing the Australian Courts* (1989) (South Carlton, Victoria, Australian Institute of Judicial Administration).

5 See H. Gamble, 'The Responsiveness of the Legal System to Change' Plenary paper presented to the 47th Annual ALTA Conference, Brisbane, 9-12 July 1992, at p. 4.

professional approach to judicial administration.⁶ This has necessitated a change in philosophy away from a belief that parties should be in charge of their own lawsuit and judges should assume the role of passive observer and neutral umpire.⁷ In Tasmania, as in most Australian jurisdictions, this has tended to involve the 'development of a partnership between the judiciary and the executive branch of government.'⁸ As it operates in Tasmania, this 'traditional' model involves a general executive department which, in consultation with the judiciary, administers Courts at all levels.

Also, as Church and Sallmann point out, greater involvement of Magistrates raises issues of intra and inter-Court governance.⁹ Intra-governance issues focus on the Small Claims Court itself. In Tasmania, for example, considerable thought must be given to how best to monitor, evaluate and make policy decisions regarding the Court's operation. Presently, Court administration is left primarily to a Chief Court Administrator. Increasingly, however, there is a need for a more collaborative model which gives more active roles, on the policy level,¹⁰ to Magistrates, Registrars, and Community groups. These issues also point to the need to determine which matters are best determined on a general level for the system as a whole and which are best left to the responsibility of individual Courts.¹¹ We must be wary lest by forcing the judiciary to become too involved in the day-to-day management of Courts, we infringe upon the judiciary's ability to perform more traditional judicial tasks. Finally, such involvement may also threaten the independence of the judiciary by forcing judges into the public arena and political debates over how to best spend

6 T. W. Church and P. A. Sallmann, 'Governing Australia's Courts' (1991) Carlton South, Victoria, Australian Institute of Judicial Administration, at 66. See also, P. A. Sallman, 'Musings on the Judicial Role in Court and Caseflow Management' (February 1989) 63 *ALJ* 98

7 R. Cranston, et al, *Delays & Efficiency in Civil Litigation* (1985) (Melbourne, Australian Institute of Judicial Administration) 169-171.

8 Report of the Civil Justice Committee Concerning the Administration of Civil Justice in Victoria, (Melbourne, Vic Govt Printer), Vol I, par 8.49, p 334. See also the two other volumes which form this report, I. R. Scott, *Preliminary Study* (1982); and J. R. Pullen, N. F. Young and S. J. Geddes, *Court Surveys and Studies 1978-1984* (1985); P. A. Sallman, *Tilting at Windmills*, *op. cit.* 102. For a discussion of similar issues in the UK see, *Civil Justice Review: Report of the Review Body on Civil Justice*, United Kingdom, 1988 CommD, Chapter 5, Judicial Administration.

9 Church and Sallmann, *op. cit.* 67.

10 See Justice McGarvie, 'Judicial Responsibility for the Operation of the Court System' (1989) 63 *ALJ* 79, 82; see also Gamble, *op. cit.* 4.

11 Church & Sallmann, *op. cit.* 74-75.

scarce public resources.¹² In the case of Small Claims Courts especially, with their close involvement of disputants who conduct their own cases, there would appear to be many advantages gained by giving Magistrates a greater say in general Small Claims Court policy and by empowering Small Claims staff by having decisions 'made by those closest to them, who are most directly involved with their implementation and consequences.'¹³

On a second level of judicial management, inter-Court governance issues concern the Court as a system comprised of several Courts at varying levels. Particularly relevant to Small Claims are problems associated with the interrelationship between the Small Claims Division and the Court of Requests. Consequently, when considering reforms at the Small Claims level, the impact of those changes on other Court divisions must also be considered.¹⁴ If Courts are to be more responsive and effective in their own governance then Courts must perceive themselves as a unified system.¹⁵

The Individual Judicial Officer

A third level of judicial management concerns the role of the individual judicial officer.¹⁶ On this individual level, too, the study has recommended that the Small Claims Magistrate be more involved in the administration of the Court system. Magistrates can no longer sit back and be content to restrict themselves to 'judging'.¹⁷ More than anything else, the success or failure of the Small Claims System as a 'people's Court' depends upon the quality of the Magistrates. That quality must express itself not only in the fair and able adjudication of cases, but also in the judiciary's active involvement in ensuring that the system as a whole operates to achieve the fair, speedy and inexpensive resolution of small claims.

Within the broad framework of a particular model of judicial administration, individual judges will have their own philosophy, views and attitudes towards Court management issues. Such diversity can be advantageous in that it accommodates

¹² See Justice McGarvie, 'The Ways Available to the Judicial Arm of Government to Preserve Judicial Independence' (1992) 1 JJA 236.

¹³ Church and Sallmann, *op. cit.* 74-75.

¹⁴ *Ibid.* 71.

¹⁵ *Ibid.*

¹⁶ Sallman, *op. cit.* 100.

¹⁷ See also, Justice G. J. Samuels, 'The Vehicles of Justice: Rolls Royce or Kingswood?' (1991) 14(2) UNSWLJ 205, 218.

Magistrates with a range of judicial styles, something which is perhaps necessary given the heavy case load of Small Claims Court Magistrates and their greater involvement with the public who represent themselves in such Courts, together with the more inquisitorial role played by the Small Claims adjudicator, both at the settlement and hearing stages. Such diversity, however, can also be disadvantageous in that too much judicial discretion can result in the rule of law being diminished. Accordingly, it is vital that Magistrates, Court staff and Justice Department administrators work collaboratively with community groups to regularly evaluate the system and strive for its continual improvement.

Role of Technology in Judicial Administration

Although not a panacea for all of the Court's administrative woes, yet another feature of the modern judicial landscape is the use of technology to improve the administration of justice. The heavy case loads and need for prompt resolution of disputes which characterise Small Claims Courts make them ideally suited for such innovations. So too, public education and increased access through such developments as interactive touchscreen computers and instructional videos are also increasingly utilised in other jurisdictions. Finally, the availability of electronic networks to bring isolated parties into contact with their counterparts elsewhere also seems well suited to a State like Tasmania which is isolated from the mainland as well as having a widely dispersed population within the State.

8.3 Issues Specific to Small Claims Courts and Tribunals

8.3.1 Court or Tribunal?

A fundamental issue involving Small Claims Courts and Tribunals concerns the type of judicial or legal structure which should be employed to handle small claims. In Tasmania, other than an early Law Reform Commission recommendation, there is little support for the view that the Small Claims Court should be transformed into a Tribunal.

8.3.2 Jurisdiction of Small Claims Courts and Tribunals

Another fundamental issue taken up by researchers of Small Claims systems involves the types of dispute which are best suited to the domain of Small Claims Courts or Tribunals. In Tasmania the present jurisdictional amount is limited to claims up to \$2000.¹⁸ Yet, in many other Australian States the amount has been increased to

18 *Magistrates Court (Small Claims Division) Act 1989 (Tas)*, s 3(1).

\$5000¹⁹ or \$6000.²⁰ The majority view in Tasmania was that despite the fact that the average amount of claim was under \$1000, the jurisdictional limit should be increased to \$5000 to bring Tasmania into line with other States. In addition to the need to account for inflation and escalating legal costs, the supporting rationale for increasing the jurisdiction was that a significant number of disputants filed a claim for the maximum \$2000 amount, suggesting that they chose to relinquish part of their claim in order to have the benefits of the Small Claims Court.

As to the types of claims which may be heard, a strong majority favoured retention of the existing subject matter jurisdiction which is already one of the widest in Australia. While noting that Small Claims Courts and Tribunals in other jurisdictions limit small claims to actions by consumers against traders, it was felt that this type of limitation was not appropriate for a smaller jurisdiction like Tasmania. Finally, it was pointed out that an increase in the jurisdictional limit for Small Claims must be accompanied by a corresponding increase in the jurisdiction of the Court of Requests. This reflects the view that the Small Claims Court is part of a wider system of Courts for Tasmania.

8.3.3 Costs of Justice

The provision of greater access to the Courts by providing affordable justice has been a major driving force behind the establishment of special procedures or separate Tribunals to deal with small claims. Accordingly, an evaluation of a system to handle small claims must take into account the extent to which the Small Claims procedure has addressed problems associated with the costs of justice and has made the Courts more accessible to ordinary citizens. Addressing this concern, the present study found that while filing fees of \$20 were low, the Court should be given the flexibility to waive that fee where a party can justify a case for doing so.

Filing fees, however, represent only part of the cost of pursuing a claim in the Small Claims Court. Taking a wider view, the study also explored other 'costs' in pursuing a case in the Small Claims Court. While on the whole, the majority of disputants found the low costs of pursuing a small claim to be one of the most attractive features of Small Claims Court, there were nevertheless a significant number of disputants

19 Victoria, Queensland and the Northern Territory.

20 New South Wales and Western Australia.

who were forced to miss work, lose pay or holiday leave time in order to gain access to the system.

It must also be recognised that there are other 'costs' involved in pursuing a claim. The existence of psychological and knowledge constraints also reflect 'costs' which must be incurred to use the system. Thus, a major recommendation of the study was the need to pilot Saturday and Evening Court sessions. Also suggested was the provision of other services such as interpreters, better brochures and an instructional video to assist disputants in understanding and utilising the Small Claims system.

8.3.4 Delays

Closely aligned to the problem of the cost of justice is that of delay.²¹ As with costs, a major rationale underlying the establishment of Small Claims Courts/Tribunals has been the provision of speedy, as well as affordable, justice. Indeed, the absence of lawyers and adoption of informal procedures are designed, in part, to avoid the backlog of cases which has come to characterise traditional Courts. As it presently operates, the Tasmanian system appears to have little difficulty with the problem of delay and most cases are settled or heard within 30 days from the time the claim is filed. This is in contrast to an average delay of 120 days which existed at the time of the disputant survey. As in the case of costs, the absence of delay was rated by disputants as one of the primary advantages of the Small Claims Court. The importance of a prompt resolution of disputes is essential to the success of a Small Claims Court and delays should continue to be monitored so that the time between filing a claim and reaching a hearing remains a matter of a few weeks rather than a few months as was once the case in Tasmania.

8.3.5 Small Claims Are Not Necessarily Simple Claims

Turning to the nature of claims filed in Small Claims Courts and Tribunals, the research is clear that small claims are not necessarily simple claims and this was another key finding of the present study.²² The Tasmanian experience also reflects the fact that various causes contribute to the complexity which can occur in Small Claims cases. Sometimes the legal nature of the claim gives rise to the complexity as in the case of a dispute involving a technical aspect of consumer law. Other cases are

21 See generally R. F. Cranston *et al*, *Delays and Efficiency in Civil Litigation* (1985) (Canberra: Australian Institute of Judicial Administration); J. R. Pullen, *Court Surveys and Studies 1978-1984* (1985) (Melbourne: Civil Justice Committee).

22 See discussion of studies by Pagter; and Yngvesson and Hennessey, in Chapter 4.

factually complex, such as building disputes. Finally, in still other cases, the complexity derives from the characteristics of the particular disputants, for example cases involving relatives, and many landlords/tenant disputes.

8.3.6 Small Claims Courts For Whom?

Who Uses the Small Claims Courts or Tribunals?

As reported in Chapters 2-4, many studies of Small Claims Courts and Tribunals found that the Court or Tribunal was dominated by business litigants²³ who used it as a cheap means of debt collection.²⁴ Reacting to this criticism, some jurisdictions²⁵ have barred business litigants from using the system. An alternative approach, adopted in Tasmania, is to require that there be a legitimate 'dispute' over a claim; the use of Small Claims to collect on a liquidated sum not in dispute is disallowed.²⁶ The evidence from the Tasmanian study is that the 'dispute' requirement appears to be effective in preventing the exploitation of the system by businesses and debt collection agencies which seek only a cheap means of debt recovery. Participation rates show that the Tasmanian Small Claims Court is well utilised by individual and business litigants alike.

Neither does the Tasmanian system appear to place an overemphasis on consumer plaintiffs. The system has remained true to the original purpose of Small Claims Courts - to provide everyone, businesses as well as individuals, a mechanism for the resolution of minor civil disputes.²⁷

Participation by Insurance Companies

23 See the discussion under the same heading in Chapter 4.

24 See generally, Chapter 2, especially the article by B. Yngvesson and P. Hennessey, 'Small Claims, Complex Disputes: A Review of the Small Claims Literature' (1975) 9 *Law and Society Review* 219.

25 For example, in most Australian jurisdictions (NSW, Victoria, WA) a person who is not a consumer is excluded from the small claims court or tribunal. A number of American states (e. g. New York) prevent businesses from using Small Claims.

26 Section 3(1) of the Tasmanian legislation provides: 'Small claim . . . does not include a claim for a debt or a liquidated demand where there is no dispute as to the liability for payment of the debt or demand, either in whole or in part.'

27 S. Weller and J. Ruhnka, 'Small Claims Courts: Operations and Prospects' (1978) (Williamsburgh Virginia: National Center for State Courts).

To the extent there is any problem with a particular group of Small Claims users in Tasmania it is the insurance companies. Motor vehicle accident cases now comprise almost half of all the cases filed. One problem regarding insurance companies is uncertainty about whether or not insurance companies are 'parties' to the action. Some Magistrates hold that they are; others that they are not. Another concern is that the heavy use of the system by insurance companies could tend to so monopolise the Court's resources that the system becomes 'captured' by one type of user. Connected to this is the belief by some lawyers, Magistrates and consumer groups that insurance companies were abusing the system by litigating matters which should be sorted out by the insurance companies themselves. Finally, although most disputants who were represented by an insurance agent were satisfied with the help they received, there is the additional concern that unfairness may result if only one side is represented by an experienced insurance agent while the other party is not. While the study identified the above problems, their solution is more difficult. Clearly, this is an area which requires more research, further monitoring and continued discussion with the community and insurance industry in an effort to ensure that abuses of the system do not occur.

Who are the Defendants in Small Claims Courts and Tribunals?

Small Claims studies overseas have also examined the composition of defendants. If businesses, in many jurisdictions, are most frequently plaintiffs, the defendants tend to be individuals, a significant portion of whom do not contest the hearing.²⁸ More disturbing still, studies have shown that in many of these cases, the defendant debtor would have had a good defence against the plaintiff business creditor.²⁹ Further, businesses tend to be repeat users of the system, thereby gaining some specialisation and expertise which may give them an advantage over the individual defendant appearing in the Court for the first time. Again, there was no evidence in the Tasmanian study that claimants are predominantly businesses or that respondents are most often individuals who frequently default even though they have a valid defence. Neither was there any evidence to suggest that repeat users of the systems fared significantly better than first-time users of the system. The qualitative evidence also showed that Small Claims Magistrates to be highly sensitive to the need to protect the

28 See I Ramsay, *Debtors and Creditors: A Socio-Legal Perspective* (1986) (Abingdon: Professional Books); C. A. McEwen and R. J. Maiman, 'Small Claims Mediation in Maine: An Empirical Assessment' (1981) 33 *Maine Law Review* 237.

29 See M. Adler and E. Wozniak 'More and Less Coercive Ways of Settling Debts'. In H. M. Drucker and N. L. Drucker (eds) (1979) *The Scottish Government Yearbook 1980* (Edinburgh: Paul Harris).

interests of a weaker party who appeared against a much more experienced and educated respondent.

8.3.7 Access Issues: Constraints which Prevent Maximum Use of Small Claims Courts and Tribunals

A major rationale for the development of special Courts and Tribunals to handle small claims was to seek to increase access to justice for citizens.³⁰ Leaving aside the philosophical question of differing views concerning the nature of justice, below are a number of areas in which the Tasmanian legislation and Small Claims system have sought to provide a ready form for the resolution of minor civil disputes.

Physical Access to Small Claims Courts and Tribunals

Most Court buildings were built at a time when Small Claims Courts did not exist and few people had contact with the law. Moreover, the buildings were designed primarily to suit the needs of judges and lawyers rather than the disputants. The physical needs of Small Claims Courts, however, are radically different than those of traditional Courts. If the atmosphere is supposed to be informal and private, if parties are to feel comfortable in conducting their own cases, and if the major emphasis is to be on the settlement of disputes, the physical surroundings must be conducive to such goals. Thus, a major component of the present study involved the examination of the physical layout of Small Claims Courts, the acoustics, scheduling, degree of privacy, availability of parking, child care, and other services in an effort to determine how responsive the Court system was to the needs of the disputants.³¹

The conclusion reached was that many improvements are urgently needed if Small Claims Court facilities in Tasmania are to facilitate the more informal atmosphere appropriate for a Small Claims Court. Among the recommendations made were the need for special conference rooms, a smaller hearing room where the adjudicator is not so elevated above the parties, better acoustics, and enhanced convenience created by better sign posting, parking facilities, night and weekend sessions and so on.

Multi-culturalism: Use of Small Claims by Non-English Speaking Groups

³⁰ See generally, Hon Mr Justice A. M. Gleeson, 'Access to Justice' (1992) 66 ALJ 270.

³¹ Church, *op. cit.* 6-7.

Finally, there is the issue of multi-culturalism and Small Claims access for migrants.³² Those who cannot speak the national language fluently are less likely to make use of legal services. Moreover, people coming to Australia from non Anglo-Saxon cultures may not understand the Australian legal system.³³ Small Claims access for migrant groups does not appear to be a problem in Tasmania as evidenced by the fact that the percentage of migrants utilising the Court equalled the proportion of migrants in the community as a whole. For those who needed it, interpreting services were also readily available, though its availability could be publicised more in the Northern part of the State.

Other Socio-Economic Factors

A person's class background, education, prior experience, as well as the language and professional mystique of the law may play a role in erecting barriers to access, especially for the poor and those from a non-English speaking background.³⁴ Although there were many gaps in the data, it was found that disputants from a lower socio-economic background and educational level were under-represented in the Tasmanian Small Claims Court. Accordingly, several recommendations were made to increase access for these groups. These included Small Claims sessions held in lower socio-economic areas, publicity targeted at such groups, and the re-design of Court forms and brochures to ensure that they are written in plain English.

Knowledge and Language Constraints

Another aspect of access relates to disputant knowledge of Small Claims Courts and Court procedures.³⁵ A disturbing finding was that lower socio-economic groups appear to under-utilise the Small Claims Court as do those in many rural areas. Also disturbing was the failure to provide respondents, as opposed to claimants, with adequate information about Court procedures. The Tasmanian study echoed the

³² See generally, Fisher, L. (ed), *Cultures Consequences in Dispute Resolution* (Proceedings of the Conference of 21-22 October 1988) (Surrey Hills, NSW, Alternative Dispute Resolution Association of Australia)

³³ See M. Cass and R. Sackville, *Legal Needs of the Poor* (1975) (Australian Government Commission of Inquiry into Poverty: Law and Poverty Series) (Canberra, AGPS).

³⁴ See R. Sackville, *Legal Aid in Australia* (1975) ((Australian Government Commission of Inquiry into Poverty: Law and Poverty Series, Canberra, AGPS); R. Sackville, *Law and Poverty in Australia* (1975) Australian Government Commission of Inquiry into Poverty: Law and Poverty Series, Canberra, AGPS); M. Sexton and L. Maher, *The Legal Mystique: The Role of Lawyers in Australian Society* (1982) (Sydney, Angus & Robertson).

³⁵ See generally, M. Cappelletti and B. Garth (eds) *Access to Justice: A World Survey* (1978) (Alphenasandenrijn, Sitjhoff and Noordhoof) who note the link between access and people's competence to recognise that a legal problem exists.

refrain of other studies which have recommended the need for measures to increase the public's awareness of the Courts, improve the informational materials available to disputants, eliminate the legal jargon from Court forms³⁶ and better educate disputants how best to utilise Small Claims procedures.³⁷

These access issues also raise questions regarding the adequacy and use of Court resources. In the words of Mr Justice Gleeson, Chief Justice of New South Wales, given the fact that the resources of Government are few and the demands on the system of justice are many,

both the judiciary and the legal profession need to establish mechanisms to monitor trends in the demands on the Court system, and in the resources made available to the system, and to draw the attention of the Executive Government, Parliament, and the public, to those trends.³⁸

Indeed, His Honour goes so far as to recommend that an 'access to justice impact statement' be made every time there is a proposal for legislative or executive action, including the establishment of Royal Commissions.³⁹

8.3.8 Role of Lawyers/ Need for Legal Advice

One of the most contentious issues involving Small Claims is the extent to which lawyers are allowed, ⁴⁰ limited⁴¹ or totally excluded⁴² from the system.⁴³ The

³⁶ See generally, R. P. Wolfe, *Small Claims Courts: Records Management and Case Processing* (1980) (Williamsburgh, Va, National Center for State Courts).

³⁷ Most Small Claims systems now publish booklets for disputants and some are required to do so by statute. See e.g., Haw. Rev. Stat s 633-36 (1985); Cal Civ Proc Code s 116(a) (Sup. 1989); NYC Civ Ct Act s 1803(b) (1987).

³⁸ Gleeson, *op. cit.*

³⁹ *Ibid.*

⁴⁰ See Note, 'The Persecution and Intimidation of the Low-income Litigant as Performed by the Small Claims Court in California' (1969) 21 *Stan. L. Rev.* 1657, at 1680 (lawyers necessary to guarantee equality between the parties).

⁴¹ See generally, J. Ruhnka and S. Weller, *Small Claims Courts: A National Examination* (1978) (Williamsburgh, Va: National Center for State Courts) 194.

⁴² National Consumer Council, *Ordinary Justice: Legal Services and the Courts in England and Wales: A Consumer View* (1989) (London, Her Majesty's Stationery Office) 291-293

⁴³ See J. S. Auerbach, *Justice Without Law? Resolving Disputes Without Lawyers*, (1983) (New York, Oxford University Press).

arguments for and against limiting or excluding lawyers from Small Claims were presented in Chapter 4. There were also a number of interesting findings from the Tasmanian study. Firstly, it was surprising to find that lawyers ranked first as the person or agency who most often informed disputants of Small Claims Court and recommended that disputants use it. This suggests that the legal profession as a whole is supportive of the system, a view which also corroborated by many interviews. Secondly, even though a lawyer was the one most likely to recommend Small Claims, the vast majority of disputants were of the view that lawyers should not be allowed to participate in Small Claims Court. Thirdly, the fact that a disputant saw a lawyer before hand appears to be of no advantage to the disputant in terms of outcome and is negatively correlated to disputant satisfaction. Only 30% of the satisfied disputants saw a lawyer before hand, whereas almost half of those who were less satisfied consulted a lawyer before hand. Further research is necessary to explain why this is the case. Perhaps lawyers give disputants too high an expectation regarding what they should expect from the Small Claims Court. On the other hand perhaps those who feel the need to see a lawyer before hand are self selecting in that they do not feel competent to handle their own case as required in a Small Claims Court. In any event, the Small Claims Court should continue to stress litigant education and assistance via Court pamphlets and other information so that parties feel comfortable and competent in presenting their own cases.⁴⁴ In general, there are strong arguments to continue the ban on lawyers in the Tasmanian Small Claims Court: the cost of proceedings is kept down, there is less delay, the disputants are empowered to utilise the legal system and the language utilised in Court is able to be far less legalistic and formalised.

8.3.9 Formality vs Informality: Rule of Law and Related Issues

Small Claims Courts and Tribunals typically strive not only to be affordable and speedy, but also less formal and technical. This is especially true in contexts where legally untrained individuals are conducting their own case. The paradox surrounding this issue is that, while too much formality in a Small Claims setting may lead to an injustice, many traditional formalities, such as rights of appeal, public hearing, legal

44 See e.g., F. Caro, Institute for Social Welfare Research, *Small Claims Court Collection in New York City: Assessing the Impact of Reform Measures* 44, 49 (1984).

representation and rules of evidence were established to promote justice and avoid injustices and promote the rule of law.⁴⁵

In summary, it can be argued that previous Small Claims research has placed too much emphasis on the desire for faster, cheaper justice; and has underestimated the importance of the disputant's perception of fairness. Indeed, one of the most important findings in the present study is that disputant satisfaction with Small Claims has less to do with winning or losing, than with whether the disputant felt that they had an opportunity to present their case, ie the perceived fairness of the proceeding. From the perspective of the disputants, the degree of importance which disputants attached to informality matched the degree to which they perceived such informality was achieved. These findings suggest that Small Claims hearings should retain the balance between informality and formality which presently exists. However, such matters as simple language, better sign-posting and education of disputants about Court procedures require constant vigilance.

8.3.10 Conciliation and Mediation vs Adjudication

Despite its importance, the role of the Small Claims Court or Tribunal in conciliation and mediation is one of the most under-theorised and under-researched aspects of Small Claims.⁴⁶ While the present study examined the wider context of the Small Claims system as a whole, it also focused on this issue of conciliation versus adjudication.

Firstly, consistent with most Small Claims studies,⁴⁷ the survey of Court files indicated that a significant proportion (one third) of all cases commenced before the Court/Tribunal result in a settlement or agreement reached by the parties. However, there is considerable variation within and among Magistrates in the emphasis given to conciliation and mediation. While some Magistrates adopted an active, interventionist style in encouraging settlement, other Magistrates (predominantly part-time ones) were far more reserved, even to the point of merely going through the motion of getting parties to settle without any real effort to probe settlement possibilities.

45 See generally, S. Ratnapala, *Welfare State or Constitutional State* (1990) (Queensland, Centre for Independent Studies); G. de Q., Walker, *The Rule of Law: Foundations of Constitutional Democracy* (1988) (Melbourne, University of Melbourne Press).

46 See L. R. Cardoso de Oliverira, *Fairness and Communication in Small Claims Courts*, unpublished Ph.D Dissertation, Harvard University, 1989.

47 See discussion and footnotes under this same heading in Chapter 4.

Clearly much more training must be given to Magistrates and Registrars in this area, especially given the fact that the legislation in Tasmania proclaims settlement as the Court's primary function. Common training and discussion amongst Magistrates will also help to lessen the differences which presently occur amongst different Magistrates.

The disputants' perceptions of settlement produced mixed reviews. The vast majority (70%) of claimants and the majority (55%) of respondents considered that the Magistrate did a good job in attempting to bring the parties to an agreement. At the same time a significant percentage of disputants felt that they had compromised more than they had intended and more than was fair. The dangers of coercion point to the fact that this is yet another area where a delicate balance must be maintained between facilitation/encouragement of settlement and coercion. Especially worrying in the Tasmanian context is the fact that the small number of Magistrates means that the person who attempts to bring parties to a settlement, is often the same one who must, if the settlement fails, at a later stage then must switch to an adjudication role.

Indeed, for some commentators, such as Sir Laurence Street,⁴⁸ Courts should be very wary of becoming involved in the provision of mediation services from their own resources and personnel:

It is not enough for a Court to arrange its internal working that the judge or registrar who has mediated will have no further connection with the case if it is not settled. The public sees a Court as an integrated institution--indeed this is to be encouraged. If the dispute is not settled the party who loses is likely to feel that the Court as an institution was, or may have been, prejudiced by the poison privately fed in by the other side during the mediation. Rostering barriers and distinctions between the functions of judges and registrars will not dispel that likelihood.⁴⁹

Hopefully, the increasing use of Registrar's Conferences and the growth of other conciliation services in Tasmania might decrease the number of cases in which the

⁴⁸ Sir Laurence Street, 'The Courts and Mediation--a Warning' (November 1991) 2 *Australian Dispute Resolution Journal* 203, 204.

⁴⁹ *Ibid.*

Magistrate is put into this position of role conflict. Perhaps, too, this is another area in which volunteer lawyers might be usefully employed.

Moving from Magistrates to the disputants themselves, one of the most interesting findings was that most disputants come to Small Claims Court not to reach an agreement with the other party, but to have the Magistrate make a decision. In part this suggests that the Court's role as a mediator is not widely known or understood. It also supports the conclusion of Borrelli who found that by the time a disputant is desperate enough to file a case in Small Claims, hopes of mediation have often been abandoned. Such a conclusion underscores the importance of linkages between the Small Claims Court and other dispute resolution mechanisms so that the parties can hopefully resolve their differences earlier. It also suggests that the Court must use Registrar's conferences to target at an early stage those disputes which might settle, for to delay is to run the risk that the parties become entrenched.

Two additional conclusions about mediation/conciliation are clear. Firstly, the differing expectations about the proper role of alternative dispute resolution mechanisms in Small Claims settings require further research if the Court is to be successful in achieving its primary function of the settlement of disputes; and secondly, Magistrates, Registrars and all those involved in the promotion of dispute settlement must, as a matter of high priority, receive formal training in this area, an issue to which we now turn.

8.3.11 Role and Qualifications of the Adjudicator and Court Staff

Training in Conciliation/Mediation

As pointed out in Chapter 4, Small Claims Magistrates typically must wear many hats: fact finder, inquisitor, defender of the weaker party who lacks the education and experience to fully understand the system, Court administrator, and enforcer. While Small Claims Magistrates are called upon to play many roles, their background and qualifications are predominantly legal. Notwithstanding the fact that the Tasmanian system has been in operation for five years, no training program has been made available, with the exception of a visit to the mainland by the State's first full time Small Claims Commissioner. Given the central role played by the Magistrate in the success of the Small Claims system, it must be a matter of top priority to ensure that Magistrates receive appropriate training in such areas as psychology, sociology, conciliation and mediation, conflict resolution and so on, to equip them adequately for

their difficult role. Given the absence of such training and the strictly legal background of Tasmania's Magistrates, it is not surprising that several of the Magistrates interviewed were less than enamoured with Small Claims duty with the result that they provided inadequate assistance to disputants, emphasised efficiency and getting through the cases ahead of the need for parties to tell their own story, and were more adversarial rather than inquisitorial in the application of formal rules of evidence.

Judicial Education Regarding Consumer Law

In regard to legal matters too, the case for more training is compelling, given the increasingly broad jurisdiction of Small Claims Courts and the plethora of new legislation, especially in consumer law. This is another area in which the full time Magistrate must be given the time to update his own knowledge as well as to meet regularly with part-time Magistrates and Court officials in order to continually improve both the legal and personal skills of all those involved in Small Claims.

Training of Court Staff

To put it bluntly, the Tasmanian Small Claims System was established 'on the cheap'. Other than a full-time Magistrate for the whole state and one secretary, the same staff who administered the Court of Requests simply took on the additional responsibility of managing the Small Claims Court. Other than on-the-job experience, no training, specific to the needs of a Small Claims Court, has been provided. Accordingly, one of the strongest implications of the present study is that a training program, along the lines outlined in the previous chapter, must be put into place.

8.3.12 Enforcement

Another issue emerging from the Small Claims literature is the problem of enforcing Court orders in relation to Small Claims. Although surveys in other jurisdictions⁵⁰ of small claim disputants frequently cite enforcement problems as one of the major failings of the system, this does not appear to be a major problem in Tasmania. Nevertheless, enforcement is an important area which must be carefully monitored. It is for this reason that it was recommended that payment of orders be made through the Court. Finally, more could be done to educate claimants about enforcement procedures as well as the fact that enforcement may be difficult, especially if the respondent has few assets.

⁵⁰ C. J. Whelan (ed), *Small Claims Courts: A Comparative Study* (1990) (Oxford, Clarendon Press) 220-221; Ruhnka and Weller, *op. cit* 161-169;

8.3.13 Disputant Satisfaction: Public Expectations and Small Claims Court Realities

While acknowledging the difficulty of finding a common denominator upon which to measure satisfaction, the present study also probed what is it about having contact with Small Claims which seems to cause a litigant to be either satisfied or dissatisfied with their experience? Also, there are many factors outside the Court's control which may contribute to a disputant's satisfaction, for example, the inherent trauma of being a defendant, regardless of the outcome, and losing one's case.⁵¹ However, there are some variables, within the Court's control, which account for a high percentage of the total variance in plaintiff satisfaction. An analysis of the variance of satisfaction amongst Tasmanian Small Claims disputants showed first that a strong majority of the disputants were, on the whole, quite satisfied with their Small Claims experience. An examination of the factors which correlated strongest with satisfaction was fairness of the decision (.74). Interestingly, the correlation between satisfaction rating and whether the party won or lost was only (.45). Other significant factors which correlated strongly with a high satisfaction rating were the degree of preparation and degree of convenience. While the experimental data is fairly primitive and conclusions necessarily tentative, it does appear that 'reforms aimed at increasing a litigant's understanding of the system should have a positive effect on litigant satisfaction'.⁵² However, much more research is necessary in order for us to understand how public satisfaction with Small Claims systems might be improved.⁵³

Also, an analysis of the factors which distinguished highly satisfied disputants from the less satisfied ones indicated that the single factor which distinguished the two groups was the disputant's perception of whether they had an opportunity to present their case. While almost all (98%) of the satisfied disputants stated that they had an opportunity to present their case, only 50% of the less satisfied disputants felt the same way. This finding is consistent with the Small Claims Court Research of Conley and O'Barr.⁵⁴ They contend that lower socio-economic groups in society most often

51 S. Weller, J. Martin, and J. C. Ruhnka, 'Litigant Satisfaction with Small Claims: Does Familiarity Breed Contempt?' (Spring 1979) *State Court Journal* 3 (While approximately two thirds of plaintiffs were satisfied with their experiences, only slightly more than half of the defendants reported being satisfied).

52 *Ibid.*

53 For a more complete discussion of the data, see Ruhnka and Weller *op. cit.*.

54 See generally, J. Conley and W. O'Barr, *Rules versus Relationships* (1990) (Chicago, University of Chicago Press).

tend to be relationship-oriented and fail to come to grips with the rule-based language and structure of Court Systems. In contrast, upper socio-economic groups are more accustomed to dealing with such formal organisations as Courts and more readily move up and down the scale of language formality which characterises particular social settings.⁵⁵ This important finding suggests that much attention must be given to access and language issues if the Small Claims Court is to be equally available to all. The written and verbal language of the Court, as well as its formal rule-based structure, must be de-mystified if lower socio-economic groups are to feel comfortable in presenting their own cases and if the Tasmanian Small Claims Court is to remain true to a view of the Courts articulated many years ago by Sr John Latham, Chief Justice of the High Court from 1935 to 1952.

Law is intimately related to national ideals, and it should be regarded, as indeed it is, as a powerful social instrument for the advancement of the people, and not as a set of technical rules by the understanding and application of which a profession earns its living. The impartial and efficient administration of justice is the foundation of any just system of society.⁵⁶

8.4 The Process of Evaluation: Waves of Reforms and Counterreforms

The present study of the Tasmanian Small Claims Court not only makes a statement about the successes and failures of the Court; it also provides a commentary of the process of Court evaluation itself. The analysis and evaluation of such institutions as Courts must be based on something more than narrow criteria such as managerial efficiency and short term gains premised on economic rationality. There is the need to resist the lure of 'crude but intuitively appealing criteria'.⁵⁷ We must adopt a more sophisticated perspective on evaluation and accountability which recognises that

⁵⁵ *Ibid.*

⁵⁶ In J. R. Rex, 'Origins and Administration of the Legal System in Tasmania,' Royal Society of Tasmania Bulletin 25 November 1978, p. 8.

⁵⁷ *Ibid* 182.

complex reality is a drama involving competing actors and interest groups each with their own scripts and visions of the whole.⁵⁸

Moreover, the purpose in examining these partial perspectives has not been to construct a grand model or theory that would combine all the diverse perspectives into one general criterion of good policy.⁵⁹ Rather, the purpose of this study has been to contribute to a shared understanding of the multiple perspectives which comprise the reality of the Small Claims Court in Tasmania. That such a shared understanding is necessary was highlighted recently by The Hon Mr Justice Gleeson,⁶⁰ Chief Justice of New South Wales, who describes the 'mutual suspicions' which unfortunately often exist between the Executive and Judicial branches of Government.

[T]here is an unwillingness to address the problem of attempting to make an accurate estimate of the needs of the Court system. . . . A major problem, however, is the absence of a mechanism for bringing the two sides together and working out a solution. In the name of the separation of powers both sides keep their distance, and mutual lack of understanding becomes entrenched.

Comprehensive and systematic evaluation can go a long way towards helping to bridge the gap to which His Honour refers.

Finally, the Tasmanian study also emphasises the point that the effective delivery of public services requires more than the design of a 'theoretically optimal program'.⁶¹ If the development of a grand theory is possible, it must be acknowledged that we are still a long way from its achievement. Perhaps the reality is that no theory will ever satisfactorily encompass, much less fully explain, such a complex reality as a system of justice.⁶² Also, in our search for easy managerial solutions to complex problems,

58 *Ibid.* 169

59 *Ibid.*

60 Hon Mr Justice A. M. Gleeson, 'Access to Justice' (1992) 66 *ALJ* 270, 272-72.

61 G. Majone, *Evidence, Argument and Persuasion in the Policy Process* (1989) (New Haven, Yale University) 167.

62 See T. Campbell, 'Legal Change and Legal Theory: The Context for a New Legal Positivism' Plenary paper presented to the 47th Annual ALTA Conference, Brisbane. Professor Campbell makes the point '... it is important to realise that all disputes about law reform relate back to conflicting political visions that cannot be resolved within the confines of legal theory itself. . . . We need to address the question of whether, despite important political divergencies, we can

we must be careful lest we abandon traditional values, such as 'professional ethics and academic integrity' which have long served the legal profession and the judiciary.⁶³ Perhaps Dean Roscoe Pound was closest to the mark when, as mentioned earlier in this thesis, he concluded that there is a 'continual movement in legal history back and forth between justice without law, as it were, and justice according to law'.⁶⁴ In this respect, the present status of Small Claims in Tasmania represents but the latest development in what has been an ongoing process of adjustment and re-adjustment. It is hoped that this evaluation has facilitated a wide-ranging dialogue which will enable all those involved with Small Claims generally, and in Tasmania in particular, to come to a better understanding of the nature of Small Claims Courts and how we can best make the necessary reforms and counterreforms so that the legal system will be responsive to the needs of society.

have an intellectually viable and moral convincing theory of law to take with us into the law reform process.'(at 5-6). Professor Campbell suggests that 'ethical positivism' offers some hope in bridging what he sees as the 'gulf between currently dynamic theory and the practicalities of the law reform process.' (at 6).

⁶³ Gamble, *op. cit* 10.

⁶⁴ R. Pound, *'An Introduction to the Philosophy of Law'* (1954) (New Haven, Yale University Press) 54.

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Appendix A

Tasmanian Small Claims Court Forms

- 1. General Claim Form**
- 2. Motor Vehicle Accident Claim Form**
- 3. Letter to Respondent Filing a Defence**
- 4. Notice of Hearing**
- 5. Notice to Attend**
- 6. Notice to Attend Registrar's Conference**
- 7. Important Notice to Parties (regarding the Hearing)**
- 7A. New Form (designed after present study)**
- 8. Notice of Order (old form)**
- 8A. Notice of Order (new form)**
- 9. Warrant of Execution**
- 10. Order Exparte for Attachment of Salary**
- 11. Affidavit for Salary Attachment**
- 12. Notice of Rehearing**

APPENDIX A
①
TASMANIA

Magistrates Court (Small Claims Division) Act 1989

**In the Magistrates Court
(Small Claims Division) at**

GENERAL CLAIM FORM

Claim No......

CLAIMANT

SURNAME	Mr Miss	Mrs Ms
GIVEN NAMES		
ADDRESS		
	Postcode	Telephone /

RESPONDENT[illegible]

PARTICULARS OF THE CLAIM

Nature of the Dispute

- () Non Supply of Goods or service () Contract not completed () Overcharging
() Work unsatisfactory () Defective product or service () Damage to property
() Non return of bond money () Retention of property () Other specify

Remedy Sought (Amount claimed \$.....)

- () Rectification or cost of rectification repairs or replacement () Reduction of Account or Refund
() Supply of goods/services or compensation () Compensation for damage to property
() Return of bond money or return of property () Other (Specify).....
() Declaration that Amount not owed

General Details about the claim—Attach extra sheets if space insufficient

[illegible]

Date:/...../.....

Fee Paid \$.....

Receipt No.:.....

Signature of Claimant:

NOTICE TO THE RESPONDENT

TAKE NOTICE that the claimant has instituted proceedings against you in the Magistrates Court (Small Claims Division at.....) pursuant to the Magistrates Court (Small Claims Division) Act 1989.

- (1) A copy of the claim form is on the reverse. The amount claimed and the nature of the claim are set out in that document.
- (2) If you wish to contest this claim you should complete the notice of defence and file it with the Registry.
- (3) If you admit the claim, you should contact the claimant and make arrangements to settle the action.
- (4) Whether you contest the claim or not, the Registrar will arrange a time and a place for the hearing of the claim, of which you will be advised.
- (5) The Registrar may also arrange a conference before him, for the purposes of attempting to settle the claim, determining the issue in dispute and assessing hearing time.
- (6) If you do not attend the hearing of this claim, the matter may be heard and determined in your absence.
- (7) Should you require information regarding these proceedings or the procedure to be followed you are invited to contact the Registry at one of the addresses set out below.

Dated this..... day of..... 19.....

.....
Registrar, Magistrates Court

Magistrates Court—Registries are located at the following addresses:

Magistrates Court Launceston
73 Charles Street, Launceston
P.O. Box 551, Launceston 7250
Phone No. (003) 32 2606

Magistrates Court Burnie
38 Alexander Street, Burnie
P.O. Box 690, Burnie 7320
Phone No. (004) 30 2215

Magistrates Court Devonport
145 Rooke Street, Devonport
P.O. Box 208, Devonport 7310
Phone No. (004) 24 1651

Magistrates Court Hobart
81 Murray Street, Hobart
G.P.O. Box 540F, Hobart 7001
Phone No. (002) 30 3617
30 3630
30 6759

TASMANIA

Magistrates Court (Small Claims Division) Act 1989

**In the Magistrates Court
(Small Claims Division) at**

MOTOR VEHICLE ACCIDENT CLAIM FORM

Claim No.

CLAIMANT

SURNAME	Mr Miss	Mrs Ms
GIVEN NAMES		
ADDRESS		
	Postcode	Telephone

RESPONDENT

SURNAME	Mr Miss	Mrs Ms
GIVEN NAMES		
ADDRESS		
	Postcode	Telephone

PARTICULARS OF THE CLAIM

1. Location of accident.....
2. Date and time of accident.....
3. Details of accident.....

4. Description of damage

5. Amount claimed \$.....

6. Claimants Insurance Company
(if relevant)
7. Respondent Insurance Company
(if known)

Date:/...../.....

Fee Paid \$.....

Receipt No.:

Signature of Claimant:

NOTICE TO THE RESPONDENT

TAKE NOTICE that the claimant has instituted proceedings against you in the Magistrates Court (Small Claims Division at.....) pursuant to the Magistrates Court (Small Claims Division) Act 1989.

- (1) A copy of the claim form is on the reverse. The amount claimed and the nature of the claim are set out in that document.
- (2) If you wish to contest this claim you should complete the notice of defence and file it with the Registry.
- (3) If you admit the claim, you should contact the claimant and make arrangements to settle the action.
- (4) Whether you contest the claim or not, the Registrar will arrange a time and a place for the hearing of the claim, of which you will be advised.
- (5) The Registrar may also arrange a conference before him, for the purposes of attempting to settle the claim, determining the issue in dispute and assessing hearing time.
- (6) If you do not attend the hearing of this claim, the matter may be heard and determined in your absence.
- (7) Should you require information regarding these proceedings or the procedure to be followed you are invited to contact the Registry at one of the addresses set out below.

Dated this..... day of.....19.....

.....
Registrar, Magistrates Court

Magistrates Court—Registries are located at the following addresses:

Magistrates Court Launceston

73 Charles Street, Launceston
P.O. Box 551, Launceston 7250
Phone No. (003) 32 2606

Magistrates Court Burnie

38 Alexander Street, Burnie
P.O. Box 690, Burnie 7320
Phone No. (004) 30 2215

Magistrates Court Devonport

145 Rooke Street, Devonport
P.O. Box 208, Devonport 7310
Phone No. (004) 24 1651

Magistrates Court Hobart

81 Murray Street, Hobart
G.P.O. Box 540F, Hobart 7001
Phone No. (002) 30 3617
30 3630
30 6759

APPENDIX

(A3)

Letter to Respondent Filing a Defence

MAGISTRATES COURT

(SMALL CLAIMS DIVISION)

RESPONDENT

You have now filed a Defence to the claim and the following information is provided as a general guide as to what will now take place.

1. A copy of your Defence will be sent to the Claimant who may:-
 - (a) Withdraw the claim
 - (b) Do nothing
2. If the Claim is not withdrawn, you will be served with a Notice of Hearing to attend before the Magistrate to put your case, you must also bring with you any documentary evidence, and any witnesses whom you wish to give evidence.

The Claimant will also be in attendance with his documents and witnesses.
3. You will both be given the opportunity to tell your side of the dispute as will your witnesses, and you will each have the right to ask questions of each other and of the witnesses.
4. IF YOU DO NOT ATTEND, THE HEARING MAY PROCEED IN YOUR ABSENCE.
5. If you are successful, the claim will be dismissed and that is the end of the matter.
6. Should you be unsuccessful with your Defence, an Order will be made against you and you will be given time to comply with the Order.
7. If you do not comply with the Order within the prescribed time, enforcement proceedings can be taken which will involve you in additional costs.

MAGISTRATES COURT
(SMALL CLAIMS DIVISION)

CLAIMANT

You have now lodged your claim and the following information is provided as a general guide as to what will now take place.

1. A copy of your claim will be sent to the Respondent, who may:-
 - (a) Pay up
 - (b) File a defence
 - (c) Do neither

If (a) and paid to this office, we will send you a cheque, if paid to you, you must notify this office, so that the claim can be withdrawn.

If (b) a copy of the defence will be sent to you.

2. Whether a Defence is filed or not, you will be served with a Notice of Hearing to attend before the Magistrate to put your case, you must also bring with you any documentary evidence, and any witnesses whom you wish to give evidence.
The Respondent will also be in attendance with his documents and witnesses.
3. You will both be given the opportunity to tell your side of the dispute as will your witnesses, and you will each have the right to ask questions of each other and of the witnesses.
4. IF YOU DO NOT ATTEND, THE HEARING MAY PROCEED IN YOUR ABSENCE.
5. If you are successful the Magistrate will make an Order in your favour to be complied with within a prescribed time.
6. Should the Order not be complied with, it will be necessary for you to come to the Registry and request enforcement proceedings to be taken this will involve you in the payment of additional fees, however, they are added to the amount due and on recovery will be refunded to you.
7. Please be aware that the issue of enforcement proceedings does not guarantee collection of the amount due.

Don't Telenor

*BAK Claim
Resp
Interested parties*



*APPENDIX A
4*

455

TASMANIA

MAGISTRATES' COURT (SMALL CLAIMS DIVISION) ACT 1989

In the Magistrates' Court
(Small Claims Division) at HOBART

CLAIM NO: 420/90.

NOTICE OF HEARING

(S. 15)

CLAIMANT

and

RESPONDENT

INTERESTED PARTY/PARTIES

TO: ALL PARTIES HEREIN:

Take notice that the above small claim has been set down for hearing before a Magistrate at The Executive Building, 4th Level, 15 Murray Street, Hobart on.....the.....day of.....1990 ata.m./p.m.

TAKE FURTHER NOTICE that you should bring with you any documentary evidence upon which you intend to rely and any witnesses you intend to call.

DISTRICT REGISTRAR

/ /

CLAIMANT/RESPONDENT

NOTE: If you do not attend at the time and place shown in this notice the matter may be determined in your absence.

If this matter has been settled and you do not wish to continue with the hearing please advise the Registry in writing forthwith.

CERTIFICATE OF SERVICE

I,(Assistant Bailiff of the Court of Requests
say that I did, on theday of.....19.....
serve the within-named:

(Please tick appropriate box)

CLAIMANT

☐

last known place of
residence/business/employment

RESPONDENT

☐

last known place of
residence/business/employment

INTERESTED PARTY/PARTIES

☐

last known place of
residence/business/employment.

with the within Notice of Hearing by sending copies thereof by:
post/certified post.

Dated this.....day of.....19.....

.....
ASSISTANT BAILIFF



APPENDIX - GEN Notes 4/1/89
A - may not refer to codes to gen
5. evidence.

456

TASMANIA

Magistrates Court (Small Claims Division) Act 1989

In the Magistrates Court
(Small Claims Division) at

Claim No:.....

To:
.....
.....

NOTICE TO ATTEND

S.25(1)(b)

CLAIMANT

and

RESPONDENT

TAKE NOTICE THAT pursuant to Section 25(1)(b) of the Magistrates Court (Small Claims Division) Act 1989, you are hereby required to attend at ontheday of19 ata.m./p.m., to give evidence and to produce any documents held by you in relation to the dispute between the parties in the above small claim.

MAGISTRATE

/ /

CERTIFICATE OF SERVICE

I,.....Assistant Bailiff of the Court of Requests
say that I did, on the.....day of.....19.....
serve the within-named claimant/respondent with the within Notice to Attend:

sending copies thereof by post to the claimant/respondents last known place of residence/business.

Dated this.....day of.....19.....

.....
Assistant Bailiff.



Registrar's Conference
TASMANIA

Magistrates Court (Small Claims Division) Act 1989

In the Magistrates Court
(Small Claims Division) at

Claim No:.....

To:

.....

.....

.....

NOTICE OF CONFERENCE BEFORE DISTRICT REGISTRAR

CLAIMANT

and

RESPONDENT

A conference will be held before the District Registrar at the Registry
.....at..... am/pm.
ontheday of19
to determine whether you are ready to proceed to a hearing.

.....
DISTRICT REGISTRAR

NOTE: Attendance at this conference is not compulsory but is
desirable in the interest of early resolution of the
claim.

CERTIFICATE OF SERVICE

I,.....Assistant Bailiff of the Court of Requests
say that I did, on the.....day of.....19.....
serve the within-named claimant/respondent with the within NOTICE OF CONFERENCE

sending copies thereof by post to the claimant/respondents last known place of residence/business.

Dated this.....day of.....19.....

.....
Assistant Bailiff.

A

7

IMPORTANT NOTICE GIVEN BEFORE HEARING
COURT OF REQUESTS (SMALL CLAIMS DIVISION)

IMPORTANT NOTICE TO PARTIES

The hearing of the Small Claim to which you are a party is shortly to commence before the Special Commissioner, whose primary function is to attempt to bring the parties to a dispute that involves a Small Claim to a settlement acceptable to all parties.

If you consider that the possibility of settlement still exists do not hesitate to inform the Special Commissioner when the Hearing commences.

REMEMBER there is no appeal from the Special Commissioner's determination.

When the Special Commissioner enters or leaves the Hearing Room all parties should stand.

The Special Commissioner should be addressed as "Mr. Commissioner".

New Book 7 Document -

END A
A NEW Form

ATTENDING THE HEARING

WHO ATTENDS? CLAIMANT - RESPONDENT - WITNESS -
MAGISTRATE

WHAT HAPPENS? The claimant will be given the opportunity to tell the Magistrate the basis of the claim. The Magistrate will be interested in hearing only the facts and he may ask questions. Statements are usually made on oath, and witnesses or documentary evidence may be presented to support the claim.

The respondent will then be given an opportunity to tell his side and present his evidence or witnesses.

IF YOU WISH TO HAVE THE MATTER ADJOURNED IN ORDER TO PRESENT EVIDENCE NOT AVAILABLE TO YOU, OR FOR ANOTHER REASON, YOU SHOULD MAKE AN APPLICATION TO THE MAGISTRATE BEFORE THE HEARING COMMENCES.

When the Magistrate has heard both sides he may also hear a statement from a third party (for example, an insurance company or consumer affairs officer).

The Magistrate will attempt to bring the parties in dispute to a settlement acceptable to all. If this is not possible he may make an Order in settlement of the dispute. The Magistrate's Decision is final and binding on all concerned, with limited provision for appeal.

It should be noted that solicitors are not permitted to appear in the small claims court without the approval of all parties and the Magistrate.

If you require an agent to put your case because you are unable, prior approval of the Magistrate must also be sought.

REMEMBER *there is no general right of appeal from the Magistrate's determination and if dissatisfied you should seek a solicitor's advice.*

THE REGISTRY BUILDING HAS NO LIFT OR RAMP ACCESS.

IF YOU HAVE DIFFICULTY NEGOTIATING STAIRS PLEASE ADVISE THE REGISTRY STAFF SO THAT AN ALTERNATIVE HEARING VENUE CAN BE ARRANGED. TELEPHONE NO: 30 3630

APPENDIX A

8

OLD NOTICE OF ORDER FORM



TASMANIA

MAGISTRATES' COURT (SMALL CLAIMS DIVISION) ACT 1989

In the Magistrates' Court
(Small Claims Division) at.....

CLAIM NO:.....

NOTICE OF ORDER

S.29(7)

CLAIMANT

-and-

RESPONDENT

INTERESTED PARTY/PARTIES

TO: ALL PARTIES HEREIN:

Pursuant to the hearing of the above small claim on the.....day
of.....19.....the following Order was made:

Dated this.....day of.....19.....

DISTRICT REGISTRAR

NOTE: If this matter was determined in your absence, your attention is directed to Section 26(2)(b) under which you may apply in writing within 7 days from receipt of this notice for a re-hearing.

CERTIFICATE OF SERVICE

I,.....Assistant Bailiff of the Court of Requests
say that I did, on the.....day of.....19.....
serve the within-named:

(Please tick appropriate box)

CLAIMANT

☐

by post/certified mail at
the last known place of
residence/business/employment.

RESPONDENT

☐

by post/certified mail at
the last known place of
residence/business/employment.

INTERESTED PARTY/PARTIES

☐

by post/certified mail at
the last known place of
residence/business/employment.

with the within Notice of Order.

Dated this.....day of.....19.....

.....
ASSISTANT BAILIFF

APPENDIX A

- 8 A

ORDER FORM

None -
m 95 91

DATA ORDER.DOC
TASMANIA
MAGISTRATES' COURT (SMALL CLAIMS DIVISION) ACT 1989

In the Magistrates Court
(Small Claims Division) at **HOBART**

CLAIM NO: NUMBER

NOTICE OF ORDER
S.29(7)

CLAIMANT
CLAIMANT

AND

RESPONDENT
RESPONDENT

INTERESTED PARTY/PARTIES
INTERESTED PARTY

TO ALL PARTIES HEREIN:

Pursuant to the hearing of the above small claim on the **DATE** the following
Order was made.

SUMMARY

DATED THIS DAY DAY OF MONTH 1991

DISTRICT REGISTRAR

NOTE: If this matter was determined in your absence, your attention is
directed to Section 26(2)(b) under which you may apply in writing
within seven (7) days from receipt of this notice for a re-hearing.

MAGISTRATES COURT (SMALL CLAIMS DIVISION) ACT 1989

INFORMATION ON ENFORCEMENT PROCEDURES

AFTER A SMALL CLAIM HEARING AN ORDER IS COMMONLY MADE IN FAVOUR OF THE CLAIMANT OR RESPONDENT.

A COPY OF THE NOTICE OF ORDER IS SENT TO BOTH PARTIES GIVING A CERTAIN TIME LIMIT FOR THE MATTER TO BE SETTLED AND PAYMENT MADE.

IF THE PARTY IN DEFAULT DOES NOT PAY OR MAKE SATISFACTORY ARRANGEMENTS ENFORCEMENT PROCEDURES MAY BE STARTED BY THE SUCCESSFUL PARTY.

THESE ARE AS FOLLOWS:-

- * A WRITTEN REQUEST TO TRANSFER THE MATTER TO THE COURT OF REQUESTS, GENERAL DIVISION, IS MADE BY COMPLETING THE APPROPRIATE FORM 'MEMORANDUM OF ORDER' AVAILABLE FROM THE COURT REGISTRY. THE PARTY MAY THEN CAUSE TO BE ISSUED:

A) **A WARRANT OF EXECUTION** WHICH GIVES THE COURT BAILIFF AUTHORITY TO LEVY ON THE DEFENDANT'S POSSESSIONS TO THE VALUE OF THE DEBT OUTSTANDING.

B) **A GARNISHEE ORDER** WHICH REQUIRES THE DEFENDANT'S EMPLOYER TO DEDUCT CERTAIN MONIES EACH WEEK FROM THE DEFENDANT'S WAGES TO THE VALUE OF THE DEBT OUTSTANDING.

COURT FILING FEES ARE PAYABLE (USUALLY UNDER \$50.00). HOWEVER, ALL COSTS ARE ADDED TO THE JUDGMENT AMOUNT WHICH THE DEFENDANT HAS TO PAY.

IN VIEW OF THE SOMETIMES DIFFICULT NATURE OF THESE PROCEDURES AFTER TRANSFER YOU MAY WISH TO SEEK HELP FROM YOUR OWN SOLICITORS WHO WILL PREPARE AND ENFORCE THE MATTER FOR YOU. COURT REGISTRY STAFF ARE PREPARED TO ASSIST IN THE PREPARATION OF DOCUMENTS BUT ARE NATURALLY CONSTRAINED BY PROFESSIONAL ETHICS NOT TO GIVE ADVICE REGARDING THE ACTUAL METHOD OF ENFORCEMENT OR OTHER STRICTLY LEGAL MATTERS.

THE COURT REGISTRY STAFF MAY NOT MAKE INVESTIGATIONS ON YOUR BEHALF AS TO THE PERSONAL DETAILS OF THE DEFENDANT E.G. HIS PLACE OF EMPLOYMENT ETC. THERE ARE VARIOUS PROFESSIONAL DEBT COLLECTION AGENCIES WHO WILL DO THIS WORK FOR YOU IF YOU WISH. SUCH FIRMS ARE LISTED IN THE TELEPHONE BOOK.

No. 25 Warrant of Execution against Personal Property and Lands of Defendant

No. of Plaintiff—
No. of Warrant—

In the Court of

HELD AT

(Local Courts Act Jurisdiction)

Between { and Plaintiff
Defendant

WHEREAS on the day of 19

the Plaintiff obtained a Judgment in this Court against the Defendant for the sum of \$ for Debt and Costs \$ and it was thereupon ordered by the Court that the Defendant should pay the same to the Registrar forthwith.

And whereas default has been made in payment according to the said Order: These are therefore to require and order you forthwith to make and levy the sum stated at the foot of this Warrant, being the amount due to the Plaintiff under the said Order including the Costs of this Execution by seizure and sale of the personal property of the Defendant, wheresoever it may be found (except the wearing apparel and bedding of him or his family, and the tools and implements of his trade, if any, to the value of Three Hundred Dollars), and also by seizure and sale of any money or bank notes, and any cheques, bills of exchange, promissory notes, bonds, scrip or share in any company, specialities or securities for money or any interest legal or equitable in any personal estates whatsoever of the Defendant, or such part or so much thereof as may be sufficient to satisfy this Execution and the cost of making and executing the same: But if you do not find sufficient property of the description abovementioned, but not otherwise, then by seizure and sale of the lands of the Defendant, and to pay what you shall have so levied to the Registrar of this Court, and make return of what you have done under this Warrant immediately upon the execution thereof.

Dated this day of 19 by the Court,

Registrar of Court

To the Bailiff of the said Court and his Assistants

Amount for which Judgment was obtained
Paid
Remaining Due
Costs of preparing this Warrant
Fee for issuing this Warrant
Bailiff's necessary expenses in making levy

Total Amount to be levied \$

\$	c

NOTICE.—The personal property is not to be sold until after the end of Seven Days next following the day on which it was seized, unless it is of a perishable nature, or at the request of the Defendant, nor lands until after the end of Twenty-one days.

In the Court of

HELD AT

(Local Courts Act Jurisdiction)

v.

**WARRANT OF
EXECUTION**
*against the personal
Property and Lands
of Defendant*

In the Court of Requests
HELD AT
(Local Courts Act Jurisdiction)

Plaint No.....

Judgment Creditor

against

Judgment Debtor

Garnishee

UPON hearing the Attorney for the Judgment Creditor and upon reading the affidavit of filed the day of 19 , it is ordered that the above-named garnishee shall, from time to time, as often as any salary shall become due and payable to the above-named judgment debtor from the above-named garnishee, deduct therefrom and pay into Court the sum of per week or a sum equivalent to the amount by which such salary shall exceed Six Dollars per week (whichever is the less) until the judgment recovered by the above-named judgment creditor against the above-named judgment debtor in the Court of on the day of 19 , amounting to the sum of together with the sum of for costs (including the costs of the garnishee proceedings) has been paid or satisfied.

And it is further ordered that the above-named garnishee, his attorney or agent, shall attend before the of the Court of at on the day of 19 , at o'clock in the noon to show cause why he should not deduct from such salary and pay to the above-named judgment creditor the said sum hereinbefore ordered to be so deducted and paid or such other sum as may be ordered.

Dated this day of 19

Registrar of the Court

NOTE.—On receipt of this order the garnishee must forthwith deliver or send to the judgment debtor a copy of the order.
NOTE.—Salary includes wages or any sum payable periodically.

[See memorandum on back hereof.

MEMORANDUM

Service of the order binds the garnishee to deduct and pay into Court the sums specified in the order so long as the order remains in force. The garnishee not less than five days before the day on which he is required to show cause may enter a defence disputing his liability to pay salary to the judgment debtor or averring that the salary belongs to some other person who has a lien or charge upon it.

If the garnishee makes default in deducting or paying into Court any sum as required by the order or if he fails to enter a defence or to appear (unless notified by the judgment creditor that he need not do so) to show cause execution may be issued against him and to the above-named garnishee and to the judgment debtor.

ORDER Ex parte for the Attachment of Salary	Judgment Debtor Garnishee	In the Court of Requests HELD AT (Local Courts Act Jurisdiction)
--	--	---

5.-AFFIDAVIT OF SERVICE OF SUMMONS OR ORDER

IN THE COURT OF REQUESTS

Held at
(Local Courts Act Jurisdiction)

BETWEEN

and

Judgment Creditor

Judgment Debtor

Garnishee

I, Bailiff of the Court of Requests,
 make oath and say that I did, on the day of 19, serve the
 within-named garnishee with two copies of the within order by—

- * delivering two copies of it to him personally in (or at)
- * leaving two copies of it for him at being his last
 known (or most usual) place of abode (or business), with
 a person apparently an inmate thereof or employed thereat and apparently not less than sixteen years
 of age (he being a proprietor of the business).
- * posting two copies of it by certified mail at the Post Office,
 in an envelope bearing the certified serial number and addressed to him at
being his last known (or most usual) place of abode
 (or business) and I have attached hereto the certified mail posting receipt issued in respect of the said
 posting and the return receipt relating thereto.
- * delivering two copies of it to

SWORN at , in Tasmania
 this day of
 One thousand nine hundred and
 Before me, Justice of the Peace.

Bailiff.

*Strike out whichever is inapplicable.

Note.—This affidavit must be annexed to, or printed on, the back of the summons or order to which it refers.

**IN THE MAGISTRATES COURT
HELD AT LAUNCESTON
(Small Claims Division)**

PLAINT NO.

Claimant

and

Respondent

I,

make oath and say as follows:

1. THAT I am the Claimant in this action.
2. THAT on the _____ day of _____ 19____, the Claimant recovered a judgment of this court in this action against the above-named Respondent for the sum of \$ _____.
3. THAT I am informed and verily believe that:-
 - (a) The said judgment is still unsatisfied for the sum so recovered.
 - (b)

(hereinafter called 'the Employer') is indebted to the said Respondent in \$ _____ and upwards for wages weekly.

- (c) The said Employer is within the jurisdiction of this Court.

4. THAT I depose to the above facts upon information supplied to me and to the best of my knowledge, information and belief the above facts are true.

Sworn at Launceston in Tasmania this)
day)
of 19 .)

Before me

A Justice of the Peace

(Plaintiff's Attorneys)



TASMANIA

MAGISTRATES COURT (Small Claims Division) Act 1989

12 Return 7 Rehearing - 1/ successful → hearing

APPENDIX A 12

TASMANIA

(Notice For Rehearing)

In the Magistrates' Court
(Small Claims Division) at

Claim No:.....

TO:

.....

.....

NOTICE OF HEARING
(S.26(2)).

CLAIMANT

and

RESPONDENT

TAKE NOTICE THAT an application to set aside the Order made on
theday of19 has been set down
for hearing before a Magistrate at
.....
onthe day of19
atam/pm.

Should the application be successful, the claim will then proceed
to a hearing and you should bring with you any documentary evidence
upon which you intend to rely and any witnesses you intend to call.

.....
DISTRICT REGISTRAR

NOTE: If you do not attend at the time and place shown in this
notice the matter may be determined in your absence.

CERTIFICATE OF SERVICE

I,Assistant Bailiff of the
Court of Requests say that I did, on the
day of19..... serve the within-named
claimant/respondent with the within

*Notice of Hearing

by:—

sending copies thereof by post to the claimant/respondents last known place of residence/business.

Dated thisday of19.....

.....
Assistant Bailiff

Appendix B

Small Claims Brochure

* Note that originals of the Court Brochure were not available. Following is a photocopy of the brochure.

NEW

THE SMALL CLAIMS DIVISION OF THE MAGISTRATES COURT

MAGISTRATES COURT SMALL CLAIMS DIVISION

This pamphlet is designed to offer assistance and guidance. It is not in itself a blueprint on how to conduct your claim. You may prefer to obtain a copy of the Magistrates Court (Small Claims Division) Act 1989 from the Government Printer and study it carefully. If you have a legal adviser he should do likewise.

The Small Claims Division is constituted by a Magistrate who is authorised to hear a claim referred to him by a claimant for his determination. At the hearing (which takes place in a less formal atmosphere than other courts) the Magistrate will endeavour to negotiate and settle the claim and, if this cannot be achieved, he will hear both sides of the case. He may then make such an order as he considers fit.

Orders made by the Magistrate have the full force of law. However, the maximum amount of compensation which may be awarded by the Magistrate is \$2 000 or the performance of work to a value not exceeding that amount. If your claim is for an amount which exceeds \$2 000, it cannot be decided by the Small Claims Division and your best plan may be to see a Solicitor.

WHAT IS A SMALL CLAIM?

Basically a small claim means a claim for the payment of an amount not exceeding \$2 000 arising out of a contract, including a claim arising out of a lease or tenancy agreement in respect of any premises leased or let to the lessee or tenant for residential purposes or a claim in tort for damage to property.

A small claim may also include a claim for a declaration that a person is not liable to another person in respect of a claim in tort for damage to property.

Basically, a contract for the purpose of a small claim to the Division is a spoken or written agreement for the supply of goods or services.

WHO MAY MAKE A CLAIM?

Any person (claimant) who has a small claim against another person (respondent). Examples of such claims are as follows:

- a person who feels that he or she has had a bad deal from a trader, whether that be for the provision of goods or for service, for example, faulty workmanship;
- claims by tenants against landlords arising from disputes concerning tenancy bonds;
- claims in relation to damage to motor vehicles arising out of an accident.

A person has the right to bring a claim in the Small Claims Division regardless of any agreement or stipulation to the contrary.

WHO ATTENDS THE HEARING?

Claimant-respondent-witness-Magistrate. You must go along yourself and take with you any evidence or witnesses you can to help you prove your case. The respondent will be allowed to do the same. Neither you nor the respondent may be represented by a lawyer unless you both agree and permission is granted by the Magistrate.

If you are unable to attend the hearing, your evidence may be submitted in writing by means of a statutory declaration or, subject to the

However, only for some special reason will the Magistrate permit someone else to take your place at the hearing. A claim may be heard and determined in the absence of any party who does not exercise his right to be present at the proceedings. Where a party does not present his case, he is entitled to have a case re-heard where the Magistrate considers that it is just and reasonable to do so.

In short, you will have to take an active interest in your case if you expect it to be successful. The Small Claims Division is not designed to do all your work for you. It is a tool for you to use, and you are expected to present your side of the case to the best of your ability.

HOW DO YOU LODGE A CLAIM?

If you live in the Hobart, Launceston, Devonport or Burnie districts, you attend the Registry of the Court of Requests in those places, and fill out a form in which you will give details of your claim.

It is preferable to file your claim in the Registry which is situated closest to the district in which your claim arose.

A fee of \$20 is currently payable when you lodge your claim.

3

WHAT HAPPENS NEXT?

The Registrar will send a copy of your claim to the respondent concerned and will arrange a time and place for the hearing, of which you will be advised.

The Registrar may also arrange a conference before him, at which both parties attend. The purpose of this conference is to attempt to determine the issues in dispute and to ascertain whether the parties are ready for the hearing. It may even be possible for the claim to be settled at that conference. If the matter is not settled at

If you do not attend the hearing, the Magistrate may determine your claim, and may be obliged to decide the matter without hearing what you have to say.

The Magistrate may sit at any time and at any place in Tasmania, having regard to the convenience of the parties to the proceedings and the location of the event from which the claim arose.

WHAT TO DO WHILE WAITING FOR THE HEARING

You should gather and have ready all important papers and documents to show the Magistrate. These may include a bill for repairs, a sales slip, a receipt, photographs of the work done, or sketch plans of the accident scene. If your claim involves a written contract, bring your copy to show the Magistrate on the day of the hearing. You should also obtain quotations in cases where your claim is for rectification or the cost of rectification of work done.

Also, you will want to bring any witnesses who can speak on your behalf. A friend who happened to be at your home when your new lawn mower was delivered and saw it was defective in some respect (or the new wardrobe you purchased had been scratched during transport), could be a witness for you. **If you wish, you may have an expert witness give evidence for you, but this must, of course, be at your own expense.**

Evidence from witnesses in the form of a statutory declaration may be produced, but verbal evidence is preferable if at all possible.

WITHDRAWAL OF CLAIMS

Once the respondent receives the Registrar's notice advising him of the hearing of your claim, he may decide to repair your defective appliance, give you a refund, pay for your motor vehicle

you are completely satisfied, you should advise the Registrar in writing that you wish to withdraw your claim.

However, if the matter has been settled by the respondent agreeing to satisfy your claim, and where the respondent has not yet done so, if you are in any doubt as to whether the respondent will do so, then you should make an application in writing, signed by both you and the respondent, for a consent order.

WHAT TO DO AT THE HEARING OF YOUR CLAIM

As claimant you will have an opportunity to tell the Magistrate what happened and what is the basis of your claim. The Magistrate will be interested in hearing only the facts, and he may ask you questions. You must tell the truth, and will be expected to make your statement on oath. (The law with respect to perjury or fabrication of evidence applies to a proceeding before a Small Claims Division.)

Show the Magistrate any documents or papers you may have which will support your claim. Your witnesses may also be heard and questioned. After you have presented your case, the Magistrate will give the respondent and his witnesses an opportunity to tell his side of the story. When he has heard both sides, he may also hear a statement by a third party (for example, an insurance company) who may also have an interest in the matter.

The Magistrate will attempt to bring the parties in dispute to a settlement acceptable to all. If this is not possible, he may make an Order with respect to the issue in dispute as he considers fit.

The Magistrate's decision is final and binding on all concerned, with limited provision for appeal.

The claim is normally decided on the evidence produced on the day of the hearing, unless the

GIVING EFFECT TO THE MAGISTRATE'S ORDER

An Order for the payment of money made by the Magistrate is deemed to be a judgment of the Court of Requests. If the Order is not complied with, the party in whose favour the Order was made can enforce the judgment as if it were an ordinary judgment of the Court of Requests.

The Registrar will explain this procedure to you, and advise you of the further costs involved to enforce the judgment.

If the Order of the Magistrate requires a party to perform work to rectify a defect in goods or services, the Magistrate may order that in default of compliance the claimant may have the work needed to rectify the relevant defect done by a competent person. If this occurs, the claimant can renew the reference of the small claim by giving written notification to the Registrar. The Magistrate will then make an Order requiring the respondent to pay such sum of money for the work required to be performed by him. That Order becomes a judgment of the Court of Requests and is enforceable accordingly.

A SUMMARY

The Small Claims Division resolves disputes involving not more than \$2 000.

If you consider you have a small claim against a person, you may lodge your claim with a Registrar of the Court of Requests. A fee of \$20 is currently payable.

The Registrar will arrange a time and place for the hearing. You will be advised.

Normally, you would attend the hearing yourself and conduct your own case.

You may call your own witnesses.

The Magistrate's decision is final and binding on all concerned with limited provision for appeal and it is suggested that any party aggrieved by a decision of the Magistrate, seek legal advice.

Should the Magistrate decide in your favour, the Registrar of the Court of Requests will explain to you how to enforce in the Court of Requests an Order which requires payment to you.

COURT OF REQUESTS' REGISTRIES ARE LOCATED AT THE FOLLOWING ADDRESSES

Court of Requests Launceston
73 Charles Street, Launceston

P.O. Box 551 P.O. Launceston 7250
Phone No. (003) 32 2606

Court of Requests Burnie
38 Alexander Street, Burnie

P.O. Box 690 P.O. Burnie 7320
Phone No. (004) 30 2215

Court of Requests Devonport
145 Rooke Street, Devonport

P.O. Box 208 P.O. Devonport 7310
Phone No. (004) 24 1651

Court of Requests Hobart
81 Murray Street, Hobart

P.O. Box 540F G.P.O. Hobart 7001
Phone No. (002) 30 3630

Appendix C

Disputants' Survey

- 1. Notes on Methodology**
- 2. Claimant Survey (those attending hearing) yellow**
- 3. Claimant Survey (those who settled prior to hearing) white**
- 4. Respondent Survey (those attending hearing) blue**
- 5. Respondent Survey (those whose case settled prior to hearing)
green**
- 6. Survey Letter**
- 7. Follow-up Letter**

Appendix C1

Notes on Methodology

A SURVEY OF DISPUTANTS:

1. Introduction

1.1 Purpose and Objectives of the Disputants' Survey

The main purposes of the disputants' survey were to:

- 1) assess, from the users' viewpoint, how well the Small Claims system was working
- 2) identify shortcomings in existing Small Claims practice and procedure
- 3) suggest possible reforms by which the system might be improved

Given these purposes, the objectives of the disputants' survey were to:

- 1) record the Small Claims experience of claimants and respondents, particularly in relation to:
 - a) the Small Claims Court procedures
 - b) the hearing
 - c) the outcome
 - d) long-term satisfaction
- 2) record reasons for dissatisfactions and elicit suggestions for improvements

1.2 Design

The primary unit of investigation for this survey is the Small Claims case. For practical and analytic reasons, the case was subdivided into two sub-groups and consequently two sub-surveys, one for claimants and one for respondents. In most respects the same information was sought from each group, but there were

questions relevant to one and not the other. For some of the analysis, responses from claimants and respondents were integrated into one case in order to compare their perceptions of the same outcomes. Individual disputant responses were also reintegrated with individual file information from the file survey.

Disputant satisfaction is the main dependent variable. The amount of delay between filing and hearing, type and amount of claim, hearing experience, and demographics of the disputants were the main independent variables.

The design is generally descriptive, using frequency distributions and cross tabulations as measures of disputant experience in regard to their Small Claims case.

1.3 Questionnaires

The questionnaires were designed by the researcher, but were principally based upon a similar set of questionnaires employed by the New Zealand Department of Justice in its extensive Small Claims Tribunal Evaluation carried out in 1985-86.¹

To ensure that the Tasmanian Small Claims evaluation examined issues of interest and relevance, draft copies of the survey instruments were widely circulated and included: the Small Claims Court Magistrate, Chief Court Administrator, Deputy-Director of the Law Department, Registrar, Deputy registrar and other Court staff. Other possible issues to be examined were discerned from disputants who were asked to complete a brief pilot survey distributed for one month to all disputants who attended a hearing. The researcher also conducted initial interviews with key Court personnel and agencies such as Consumer Affairs, which work closely with Small Claims. The researcher also considered issues raised in other Small Claims studies and personally observed approximately twenty Small Claims cases.

¹*Small Claims Tribunal Evaluation* (1986), Study Series 17, Policy and Research Division, Department of Justice; see also Sullivan, *The Small Claims Tribunal: An Assessment of Evaluation Issues* (1985) Department of Justice, Wellington. The Department of Justice kindly gave the researcher permission to utilise its questionnaires for the present study.

In their penultimate form the survey instruments were sent to 4 disputants, two claimants and two respondents who returned them in the mail. The researcher also spent two days at the Small Claims Court and observed while several disputants completed the surveys in his presence and were permitted to seek necessary clarifications and invited to comment on the survey questionnaire. Following this process, the final questionnaire was produced.

1.4 Survey Population

The survey population is the same as the file survey - all Small Claims cases from July 1, 1988 through June 30, 1989. In most cases there was one claimant and one respondent per case, but on the odd occasion there was more than one. The survey included both cases which had settled prior to the hearing as well as those which went to a hearing. The exact numbers involved, names, addresses and phone numbers were identified from Small Claims Court files.

1.5 Sampling

Surveys were mailed to a random sample of cases taking every third case from the population of all filed cases during fiscal year 1989. Cases come into the Court Registry at random and are filed in chronological order. Thus the first case filed in 1989 is listed as 1/1989. Different questionnaires were sent to those who went to a hearing (appendices C2, C4) and to those who, according to the file, withdrew their claim or settled the case prior to a hearing (appendices C3,C5).

Note that the response rate and number of responses received from those whose cases settled prior to the hearing (C3, C5) were so poor that the general results of these sub-surveys are not reported here, though some broad comment is made upon the results of these two surveys in Chapter 6, section 6 of the body of this thesis.

Although cases were selected from the entire state and included a sample from each of the major regions (Hobart, Launceston, Burnie and Devonport) no attempt was made to compare differences by region. This was because the sub-sample numbers were too small and regional variations are unlikely in most respects because one full-time Magistrate services the entire state. He is centred

in Hobart, the major population centre, and travels periodically to the other regions.

Names and addresses were obtained, with permission from the Department of Justice, from the Court file. All stationery was University of Tasmania stationery and disputants were assured that any information they gave would be kept in the strictest confidence (appendix C6). Contact names, addresses and phone numbers were provided should they have required any assistance in answering the questions asked. Completed questionnaires were posted to the researcher at the University of Tasmania. One follow-up letter was sent to those who were slow to respond (appendix C7).

Appendix C.2.

Small Claims Court Evaluation

Claimants Awareness Hearing

INSTRUCTIONS

Please answer the questionnaire in relation to your experience with the Small Claims Court

Please answer by ticking a box or writing comments in the space provided.

Tick one box only unless asked to tick more than one.

Please return the questionnaire as soon as possible (preferably within three days) in the enclosed addressed stamped envelope.

If you have been to more than one hearing, base your answers on your most recent hearing.

CONFIDENTIALITY

The confidentiality of your replies will be protected as we will not be reporting any information that allows individuals to be identified.

ASSISTANCE/QUESTIONS

If you need any assistance in filling out this form or have any questions, please write or phone Eugene Clark, Law Faculty, University of Tasmania at 002 20 2075. If no answer, please leave a message at 202073 (Bus) or 251115 (Home).

THANK YOU!

THANK YOU FOR GIVING UP A FEW MINUTES OF YOUR TIME TO ASSIST US IN MAKING THE SMALL CLAIMS COURT RESPONSIVE TO YOU, THE PEOPLE IT WAS DESIGNED TO SERVE

CLAIMANT QUESTIONNAIRE

Tick one box only unless asked otherwise

THE DISPUTE

1 How long had you been aware of the dispute (ie problem or disagreement) before you filed a claim at the Small Claims Court?

- 1 month or less ☐
- over 1 month, up to 3 months ☐
- over 3 months up to 6 months ☐
- over 6 months up to 1 year ☐
- over 1 year up to 18 months ☐
- over 18 months ☐

2 (a) Had you asked for help or advice in settling the dispute before you went to the Small Claims Court?

- Yes ☐ → go to Q 2 (b)
- No ☐ → go to Q 3

(b) IF YES: Whom did you ask? _____

Please state who they are, eg, family member, friend, lawyer, rather than their name

3 Who suggested you go to the Small Claims Court?

- family members (s) ☐
- friend ☐
- your lawyer ☐
- respondent's lawyer ☐
- Consumer Affairs ☐
- The person you had the dispute with ☐

(continued over page . . .)

your own knowledge of the Small Claims Court ☐
 insurance company ☐
 Legal Aid ☐
 Community Legal Service ☐
 other * *(Please state who)*

4 (a) If there were no Small Claims Court, would you have taken the dispute to the Court of Requests?

definitely yes ☐
 probably yes ☐
 probably no ☐
 definitely no ☐

(b) If you answered 'probably no' or 'definitely no', please state why.

**Please state all your reasons*

FILING THE CLAIM

5 Was your claim transferred from the Court of Requests?

Yes ☐ → go to Q 9

No ☐ → go to Q 6

6 Did you file your claim -

in person ☐

by mail ☐

other * *(Please state)* ... ☐

7 (a) How helpful were the court staff when you filed the claim?

- | | | | |
|--------------------|--------------------------|---|---------------|
| very helpful | <input type="checkbox"/> |] | go to Q 8 |
| quite helpful | <input type="checkbox"/> | | |
| not very helpful | <input type="checkbox"/> |] | go to Q 7 (b) |
| not at all helpful | <input type="checkbox"/> | | |
| not applicable | <input type="checkbox"/> | → | go to Q 9 |

(b) In what ways were the court staff not helpful?

* Please state all your reasons

8. Would you have liked more help when you filled out the claim form?

Yes ☐

No ☐

HEARING AND THE ORDER

After the court came to a decision and made an order on your claim, did you or the respondent apply for, and get, a rehearing of the claim?

no, claim was not reheard ☐ → go to Q 10

yes, claim was reheard ☐ → please answer Q10-26b
in relation to the re-
hearing rather than
the first hearing

9 Looking back, how well prepared were you for the hearing?

- | | |
|--------------------------|--------------------------|
| very well prepared | <input type="checkbox"/> |
| quite well prepared | <input type="checkbox"/> |
| not very well prepared | <input type="checkbox"/> |
| not at all well prepared | <input type="checkbox"/> |

11 (a) Did you go to a lawyer for advice?

Yes ☐ → go to Q11(b)

No ☐ → go to Q11(c)

(b) IF YES: Was this to your advantage?

Yes ☐] go to Q12

No ☐]

(c) IF NO: Looking back, do you think it would have been helpful to you at the hearing if you had gone to a lawyer for advice?

Yes ☐] go to Q12

No ☐]

12 (a) Did your insurance company representative participate in your hearing?

Yes ☐ → go to Q12(b)

No ☐ → go to Q13

(b) IF YES: Was this to your advantage?

Yes ☐] go to Q12(c)

No ☐]

(c) Please indicate below your reasons for stating why it was an advantage or disadvantage to have your insurance company representative participate in your hearing.

13 Did you know before the day of the hearing that you could have witnesses at a Small Claims Court Hearing?

Yes ☐

No ☐

(a) Did you call a witness at the hearing?

Yes ☐ → go to Q14(b)

No ☐ → go to Q 15

(b) Do you think you used your witness (es) to your advantage at the hearing?

Yes ☐

No ☐

15 Did you know before the day of the hearing whether the respondent was going to bring a witness?

Yes ☐

No ☐

16 How private do you think the hearing was?

very private ☐

quite private ☐

not very private ☐

not at all private ☐

17 How important is it to you that the Small Claims hearings be held in private?

very important ☐

quite important ☐

neither important nor unimportant ... ☐

not very important ☐

not at all important ☐

18 The Court aims to keep its hearings as informal as possible.

How informal do you think the hearing was?

- very informal ☐
- quite informal ☐
- neither informal nor formal ☐
- not very informal ☐
- not at all informal ☐

19 How important is it to you that Small Claim hearings be informal?

- very important ☐
- quite important ☐
- neither important nor unimportant ☐
- not very important ☐
- not at all important ☐

20 Do you think claimants and respondents should be able to have lawyers representing them in Small Claims hearings?

- definitely yes ☐
- probably yes ☐
- probably no. ☐
- definitely no ☐

21 Did the respondent appear for the hearing?

Yes ☐ → go to Q22

No ☐ → go to Q 23

22 (a) How good do you think the Commissioner/Magistrate was in trying to get you and the respondent to agree to a settlement of your claim?

- very good ☐] go to Q23
- quite good ☐]
- not very good ☐] go to Q 22(b)
- not at all good ☐]

(b) In what ways was the Commissioner/Magistrate not good in trying to get you and the respondent to settle your claim?

* Please state all your reasons

(a) How fair do you think the Commissioner/Magistrate was in the way he controlled the hearing?

very fair ☐] go to Q24
quite fair ☐]

not very fair ☐] go to Q23(b)
not at all fair ☐]

(b) In what ways was the Commissioner/Magistrate not fair?

* Please state all your reasons

(a) How convenient or inconvenient was it for you to go to the hearing?

very convenient ☐]
quite convenient ☐ go to Q25
neither convenient nor inconvenient ☐]
quite inconvenient ☐]
very inconvenient ☐ go to Q24(b)

(b) Why was it inconvenient?

* Tick one or more boxes

it took too long ☐
wrong time of day ☐
transport ☐
location of court ☐
difficulties with work ☐
family arrangements ☐
other * please state ☐

25 (a) Did you take time off paid employment to attend the hearing?

Yes ☐ → *answer Q25(b), (c), (d)*

No ☐ → *go to Q26*

(b) How many hours did you take off to attend the hearing?

two hours or less ☐

over 2 hours, up to 4 hours ☐

over 4 hours, up to 6 hours ☐

over 6 hours* ☐

(please state how many)

(c) Did you take annual leave?

Yes ☐

No ☐

(d) Did you lose any pay?

Yes ☐

No ☐

26 (a) Did you have to make special arrangements to have your children looked after?

Yes ☐ → *answer Q26(b), (c) and (d)*

No ☐ → *go to Q26(c) and (d)*

(b) For how many hours did you have to have your children looked after?

two hours or less ☐

over 2 hours, up to 4 hours ☐

over 4 hours, up to 6 hours ☐

over 6 hours* ☐

**(please state how many)*

(c) Would you prefer that NIGHT Court sittings be made available for the Small Claims Court?

Yes ☐ → *(Please indicate what night or nights and what times you think would be best for night time court sessions)*

No ☐

(d) Would you be in favour of Saturday Court sittings?

Yes ☐

No ☐

THE OUTCOME

27 After the Small claims Court came to a decision and made an order on your claim -

(a) did you or the respondent apply for, and get, a rehearing of the claim?

No, claim was not reheard

☐

→ go to Q28

Yes, claim was reheard

☐

→ Please answer Q28-36 in relation to the outcome of the REHEARING rather than the first hearing.

28 Which of the following statements would you say best describes the outcome of the hearing?

You and the respondent reached an agreement

☐

→ go to Q32

The Commissioner/Magistrate made a decision

☐

→ go to Q29

29. Did the Commissioner/Magistrate explain the reasons for his decision?

Yes

☐

→ go to Q30

No

☐

→ go to Q32

Partially

☐

→ go to Q30

30 How well did the Commissioner/Magistrate explain his reasons for coming to the decision?

very well

☐

quite well

☐

not very well

☐

not at all well

☐

31. Would you say the agreement/decision was in your favour?

Yes

☐

In part

☐

No

☐

32 Looking back, how fair was the agreement/decision?

- very fair ☐
- quite fair ☐
- not very fair ☐
- not at all fair ☐

33 Which of the following statements would you say best describes what you wanted to happen at the hearing immediately before it started?

- I wanted to try to come to an agreement with the respondent ☐
- I wanted the Commissioner/Magistrate to make the decision ☐
- Other * (please state) ☐

34 Had you made up your mind before the hearing how much you were prepared to compromise by?

- Yes ☐ → go to Q35
- No ☐ → go to Q36

35 (a) Did you compromise more than you intended?

- Yes ☐
- No ☐

35 (b) Do you think that you compromised more than was fair?

- Yes ☐
- No ☐

36 During the hearing did you feel you had a reasonable chance to put your side of the case properly?

Yes ☐ → Go to Q 37

No ☐ Please state why

AFTER THE HEARING

37. Did you know that you could not appeal against the order?

Yes ☐

No ☐

PAYMENT OF ORDER

38. Do you consider that the final order was -

in your favour ☐ → please answer Q39-42

not in your favour ☐ → please answer Q43-45

ORDER IN YOUR FAVOUR - QUESTIONS 39-42

39. Was the order -

- a payment to be made to you or your insurance co ☐
- goods to be supplied to you ☐
- work to be done for you ☐
- a declaration that you were not liable ☐
- a reduction in the amount to be paid by you ☐
- other * (please state) ☐

40. Has this happened -

- in full ☐ → go to Q41
- in part ☐
- not at all ☐] go to 42

- 41 How long did it take from the time of the order until you received the full payment?

7 days or less	<input type="checkbox"/>	<div style="border-left: 1px solid black; border-right: 1px solid black; height: 100px; width: 30px; display: inline-block; vertical-align: middle;"></div>	go to Q 42
over 7 days up to 14 days	<input type="checkbox"/>		
over 14 days up to 21 days	<input type="checkbox"/>		
over 21 days up to 28 days	<input type="checkbox"/>		
over 4 weeks up to 6 weeks	<input type="checkbox"/>		
over 6 weeks up to 8 weeks	<input type="checkbox"/>		
over 8 weeks* (please state) ..	<input type="checkbox"/>		

- 42 (a) Have you taken any steps to enforce payment?

Yes ☐ → go to Q46

No ☐ → go to Q42(b)

- (b) IF NOT PAID IN FULL: Why haven't you taken any steps to enforce payment?

* Please state all your reasons, then go to Q46

ORDER NOT IN YOUR FAVOUR QUESTIONS 43-45
--

- 43 Was the order -

a payment to be made by you or your insurance co	<input type="checkbox"/>
goods to be supplied by you	<input type="checkbox"/>
work to be done by you	<input type="checkbox"/>
claim was dismissed, struck out or no jurisdiction	<input type="checkbox"/>
other * (please state)	<input type="checkbox"/>

44. (a) So far, have you done this -

in full	<input type="checkbox"/>	→	go to Q45
in part	<input type="checkbox"/>]	→ go to Q44(b)
not at all	<input type="checkbox"/>		

(b) Why have you not followed the order?

* *Please state all your reasons*

45 Have any court enforcement procedures relating to your Small Claims order been taken out against you?

Yes ☐

No ☐

OVERALL OPINION

46 (a) If you had another dispute similar to this one, would you use the Small Claims Court again?

Yes ☐ → go to Q47

No ☐ → go to Q 46(b)

(b) IF NO: Why have you said you would not use the Small Claims Court again? * *Please state all your reasons*

- 47 What do you see as the strengths, or good points, of the Small Claims Court?

- 48 What do you see as the weaknesses, or bad points, of the Small Claims Court?

- 49 Do you have any suggestions for improving Small Claims Courts?

- 50 How many times have you been involved in the Small Claims Court as - * *fill in BOTH boxes*

Number

A claimant ☐

A respondent ☐

- 51 (a) How many times have you been involved in debt proceedings in the Court of Requests as - * *fill in BOTH boxes*

A plaintiff ☐

A defendant ☐

- 52 On a scale of 1 (very unsatisfied) to 10 (very satisfied) how would you rate your satisfaction with the Small Claims Court?

(circle one) 1-2-3-4-5-6-7-8-9-10

unsatisfied



satisfied

If you are a business or organisation, please stop here.
Thank you for your time and thoughts.

If you were not defending on behalf of a business or organisation but as a PRIVATE INDIVIDUAL, please answer questions 52-58 so that we may evaluate how well the court is serving particular groups. Again all information will be kept in the strictest confidence and no individuals identified. However, if you have strong objections about any particular questions, we of course respect your feelings and thank you for completing what you can.

BACKGROUND

Finally, we would like to ask you a few questions about yourself and your background.

52 Sex: male ☐
 female ☐

Approximate Age: _____
Country of birth: _____
If not born in Australia, how long
have you lived in Australia: _____

53 What is your current main job? _____ (Please try to describe briefly
what you do and your place of work, eg teacher in a large high
school, clerk in a small factory, mother with young children).

54 What is the highest level of education you have completed?

- Completed Technical College or University ☐
Some Technical College or University ☐
Trade Certificate ☐
Completed secondary school (Year 12) ☐
Some secondary schooling ☐
Completed primary school ☐
Some primary schooling ☐

55 What is your estimated annual income before tax? (If retired please use your last year of work).

nil	<input type="checkbox"/>
\$1 - \$9,999	<input type="checkbox"/>
\$10,000 - \$19,999	<input type="checkbox"/>
\$20,000 - \$29,999	<input type="checkbox"/>
\$30,000 - \$39,999	<input type="checkbox"/>
\$40,000 - \$49,999	<input type="checkbox"/>
\$50,000 or over	<input type="checkbox"/>

56 Present marital status -

married, or living in a defacto relationship	<input type="checkbox"/>
not married	<input type="checkbox"/>
separated, divorced	<input type="checkbox"/>
widowed	<input type="checkbox"/>
other * (please state)	<input type="checkbox"/>

57 What is/was your spouse's/partner's occupation?

* Please be specific, eg, primary school teacher, mechanical engineer

58 What is the estimated annual income of your spouse/partner before tax? (if retired please refer to last year of work).

nil	<input type="checkbox"/>
\$1 - \$9,999	<input type="checkbox"/>
\$10,000 - \$19,999	<input type="checkbox"/>
\$20,000 - \$29,999	<input type="checkbox"/>
\$30,000 - \$39,999	<input type="checkbox"/>
\$40,000 - \$49,999	<input type="checkbox"/>
\$50,000 or over	<input type="checkbox"/>

THANKS AGAIN FOR YOUR COOPERATION

Could you please post this questionnaire as soon as possible.

Small Claims Court Evaluation

(Claimants settled prior to hearing)

INSTRUCTIONS

Please answer the questionnaire in relation to your experience with the Small Claims Court

Please answer by ticking a box or writing comments in the space provided.

Tick one box only unless asked to tick more than one.

Please return the questionnaire as soon as possible (preferably within three days) in the enclosed addressed stamped envelope.

If you have been to more than one hearing, base your answers on your most recent hearing.

CONFIDENTIALITY

The confidentiality of your replies will be protected as we will not be reporting any information that allows individuals to be identified.

ASSISTANCE/QUESTIONS

If you need any assistance in filling out this form or have any questions, please write or phone Eugene Clark, Law Faculty, University of Tasmania at 002 20 2075. If no answer, please leave a message at 202073 (Bus) or 251115 (Home).

THANK YOU!

THANK YOU FOR GIVING UP A FEW MINUTES OF YOUR TIME TO ASSIST US IN MAKING THE SMALL CLAIMS COURT RESPONSIVE TO YOU, THE PEOPLE IT WAS DESIGNED TO SERVE

CLAIMANT QUESTIONNAIRE

Tick one box only unless asked otherwise

THE DISPUTE

1 How long had you been aware of the dispute (ie problem or disagreement) before you filed a claim at the Small Claims Court?

- 1 month or less ☐
- over 1 month, up to 3 months ☐
- over 3 months up to 6 months ☐
- over 6 months up to 1 year ☐
- over 1 year up to 18 months ☐
- over 18 months ☐

2 (a) Had you asked for help or advice in settling the dispute before you went to the Small Claims Court?

- Yes ☐ → go to Q 2 (b)
- No ☐ → go to Q 3

(b) IF YES: Whom did you ask? _____

Please state who they are, eg, family member, friend, lawyer, rather than their name

3 Who suggested you go to the Small Claims Court?

- family members (s) ☐
- friend ☐
- your lawyer ☐
- respondent's lawyer ☐
- Consumer Affairs ☐
- The person you had the dispute with ☐

(continued over page ...)

your own knowledge of the Small Claims Court ☐
 insurance company ☐
 Legal Aid ☐
 Community Legal Service ☐
 other * (Please state who)

4 (a) If there were no Small Claims Court, would you have taken the dispute to the Court of Requests?

definitely yes ☐
 probably yes ☐
 probably no ☐
 definitely no ☐

(b) If you answered 'probably no' or 'definitely no', please state why.

**Please state all your reasons*

FILING THE CLAIM

5 Was your claim transferred from the Court of Requests?

Yes ☐ → go to Q 9

No ☐ → go to Q 6

6 Did you file your claim -

in person ☐
 by mail ☐
 other * (Please state) ... ☐

(a) How helpful were the court staff when you filed the claim?

- | | | | |
|--------------------|--------------------------|---|---------------|
| very helpful | <input type="checkbox"/> |] | go to Q 8 |
| quite helpful | <input type="checkbox"/> | | |
| not very helpful | <input type="checkbox"/> |] | go to Q 7 (b) |
| not at all helpful | <input type="checkbox"/> | | |
| not applicable | <input type="checkbox"/> | → | go to Q 9 |

(b) In what ways were the court staff not helpful?

* Please state all your reasons

8. Would you have liked more help when you completed the claim form?

Yes ☐

No ☐

9. The court file indicates that your claim was withdrawn or settled before the hearing. Did you compromise more than you intended?

Yes ☐

No ☐

10. Was the settlement fair?

Yes ☐

No ☐

OVERALL OPINION

11.(a) If you had another dispute similar to this one, would you use the Small Claims Court again?

Yes ☐ → go to Q 12

No ☐ → go to Q 11(b)

(b) IF NO: Why have you said you would not use the Small Claims Court again? * Please state all your reasons

- 12 What do you see as the strengths, or good points, of the Small Claims Court?

- 13 What do you see as the weaknesses, or bad points, of the Small Claims Court?

- 14 Do you have any suggestions for improving Small Claims Courts?

- 15 (a) How many times have you been involved in the Small Claims Court as - * *fill in BOTH boxes*

Number

A claimant

A respondent

- 15 (b) How many times have you been involved in debt proceedings in the Court of Requests as - * *fill in BOTH boxes*


A plaintiff

A defendant

- 16 On a scale of 1 (very unsatisfied) to 10 (very satisfied) how would you rate your satisfaction with the Small Claims Court?

(Circle one)

1-2-3-4-5-6-7-8-9-10

unsatisfied  satisfied

If you are a business or organisation, please stop here.

Thank you for your time and thoughts.

If you were not defending on behalf of a business or organisation but as a PRIVATE INDIVIDUAL, please answer questions 17-23 so that we may evaluate how well the court is serving particular groups. Again all information will be kept in the strictest confidence and no individuals identified. However, if you have strong objections about any particular questions, we of course respect your feelings and thank you for completing what you can.

BACKGROUND

Finally, we would like to ask you a few questions about yourself and your background.

- 17 Sex: male ☐
 female ☐

Approximate Age: _____
 Country of birth: _____
 If not born in Australia, how long
 have you lived in Australia: _____

- 18 What is your current main job? _____ *(Please try to describe briefly what you do and your place of work, eg teacher in a large high school, clerk in a small factory, mother with young children).*

- 19 What is the highest level of education you have completed?

- Completed Technical College or University ☐
 Some Technical College or University ☐
 Trade Certificate ☐
 Completed secondary school (Year 12) ☐
 Some secondary schooling ☐
 Completed primary school ☐
 Some primary schooling ☐

20. What is your estimated annual income before tax? (If retired please use your last year of work).

nil	<input type="checkbox"/>
\$1 - \$9,999	<input type="checkbox"/>
\$10,000 - \$19,999	<input type="checkbox"/>
\$20,000 - \$29,999	<input type="checkbox"/>
\$30,000 - \$39,999	<input type="checkbox"/>
\$40,000 - \$49,999	<input type="checkbox"/>
\$50,000 or over	<input type="checkbox"/>

- 21 Present marital status -

married, or living in a defacto relationship	<input type="checkbox"/>
not married	<input type="checkbox"/>
separated, divorced	<input type="checkbox"/>
widowed	<input type="checkbox"/>
other * (please state)	<input type="checkbox"/>

- 22 What is/was your spouse's/partner's occupation?

* Please be specific, eg, primary school teacher, machanical engineer

- 23 What is the estimated annual income of your spouse/partner before tax? (if retired please refer to last year of work).

nil	<input type="checkbox"/>
\$1 - \$9,999	<input type="checkbox"/>
\$10,000 - \$19,999	<input type="checkbox"/>
\$20,000 - \$29,999	<input type="checkbox"/>
\$30,000 - \$39,999	<input type="checkbox"/>
\$40,000 - \$49,999	<input type="checkbox"/>
\$50,000 or over	<input type="checkbox"/>

THANKS AGAIN FOR YOUR CO-OPERATION

Could you please post this questionnaire as soon as possible.

Small Claims Court Evaluation

Dispositive who answers
hearing

INSTRUCTIONS

Please answer the questionnaire in relation to your experience with the Small Claims Court

Please answer by ticking a box or writing comments in the space provided.

Tick one box only unless asked to tick more than one.

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THANK YOU!

THANK YOU FOR GIVING UP A FEW MINUTES OF YOUR TIME TO ASSIST US IN MAKING THE SMALL CLAIMS COURT RESPONSIVE TO YOU, THE PEOPLE IT WAS DESIGNED TO SERVE

RESPONDENT QUESTIONNAIRE

Tick one box only unless asked otherwise

THE DISPUTE

How long had you been aware of the dispute (ie problem or disagreement) before the claimant filed a claim at the Small Claims Court?

- 1 month or less ☐
- over 1 month, up to 3 months ☐
- over 3 months up to 6 months ☐
- over 6 months up to 1 year ☐
- over 1 year up to 18 months ☐
- over 18 months ☐

2 (a) Had you asked for help or advice in settling the dispute before the claim went to the Small Claims Court?

- Yes ☐ ➔ go to Q 2 (b)
- No ☐ ➔ go to Q 3

(b) IF YES: Whom did you ask? _____
Please state who they are, eg, family member, friend, lawyer, rather than their name

ILING THE CLAIM

Was the claim transferred from the Court of Requests?

- Yes ☐
- No ☐

(a) Did you ask the court staff for information or assistance after you received notice that the claimant had filed a claim in Small Claims?

- Yes ☐ ➔ go to Q4(b)
- No ☐ ➔ go to Q5

(b) How helpful were the court staff?

- | | | | |
|--------------------|--------------------------|---|-------------|
| very helpful | <input type="checkbox"/> | } | go to Q5 |
| quite helpful | <input type="checkbox"/> | | |
| not very helpful | <input type="checkbox"/> | } | go to Q4(c) |
| not at all helpful | <input type="checkbox"/> | | |

(c) In what ways were the court staff not helpful?

* *Please state all your reasons*

5 Would you have liked more help in responding to the claim?

- Yes ☐
- No ☐

HEARING AND THE ORDER

6 (a) If you did not settle your case and a hearing was set, did you attend the hearing?

- Yes ☐ → go to Q 7
- No ☐ → go to Q 6(b)

(b) Would you please tell us your reasons for not attending the hearing?

(c) If you did not attend the hearing, after the court came to a decision and made an order on the claim, did you apply for, and get, a rehearing of the claim?

- | | | |
|---------------------------|----------------------------|---|
| no, claim was not reheard | <input type="checkbox"/> → | go to Q 7 |
| yes, claim was reheard | <input type="checkbox"/> → | <i>please answer the following
in relation to the re-
hearing rather than
the first hearing</i> |

7 Looking back, how well prepared were you for the hearing?

- | | |
|--------------------------|--------------------------|
| very well prepared | <input type="checkbox"/> |
| quite well prepared | <input type="checkbox"/> |
| not very well prepared | <input type="checkbox"/> |
| not at all well prepared | <input type="checkbox"/> |

8 (a) Did you go to a lawyer for advice?

Yes ☐ → go to Q8b)

No ☐ → go to Q8(c)

(b) IF YES: Was this to your advantage?

Yes ☐

No ☐] go to Q9

(c) IF NO: Looking back, do you think it would have been helpful to you at the hearing if you had gone to a lawyer for advice?

Yes ☐

No ☐] go to Q9

9 (a) Did your insurance company representative participate in your hearing?

Yes ☐ → go to Q9(b)

No ☐ → go to Q10

(b) IF YES: Was this to your advantage?

Yes ☐

No ☐] go to Q9(c)

(c) Please indicate below your reasons for stating why it was an advantage or disadvantage to have your insurance company representative participate in your hearing.

10 Did you know before the day of the hearing that you could have witnesses at a Small Claims Court Hearing?

Yes ☐

No ☐

11 (a) Did you call a witness at the hearing?

Yes ☐ → go to Q11(b)

No ☐ → go to Q 12

(b) Do you think you used your witness (es) to your advantage at the hearing?

Yes ☐

No ☐

12 Did you know before the day of the hearing whether the claimant was going to bring a witness?

Yes ☐

No ☐

13 How private do you think the hearing was?

very private ☐

quite private ☐

not very private ☐

not at all private ☐

14 How important is it to you that the Small Claims hearings be held in private?

very important ☐

quite important ☐

neither important nor unimportant ☐

not very important ☐

not at all important ☐

15 The Court aims to make its hearings as informal as possible.

How informal do you think the hearing was?

- very informal ☐
- quite informal ☐
- neither informal nor formal ☐
- not very informal ☐
- not at all informal ☐

16 How important is it to you that Small Claim hearings be informal?

- very important ☐
- quite important ☐
- neither important nor unimportant ☐
- not very important ☐
- not at all important ☐

17 Do you think claimants and respondents should be able to have lawyers representing them in Small Claims hearings?

- definitely yes ☐
- probably yes ☐
- probably no. ☐
- definitely no ☐

18 Did the claimant appear for the hearing?

- Yes ☐ → go to Q19
- No ☐ → go to Q 20

19 (a) How good do you think the Commissioner/Magistrate was in trying to get you and the claimant to agree to a settlement of your claim?

- very good ☐] go to Q20
- quite good ☐]
- not very good ☐] go to Q 19(b)
- not at all good ☐]

- (c) In what ways was the Commissioner/Magistrate not good in trying to get you and the respondent to settle your claim?

* *Please state all your reasons*

- 20 (a) How fair do you think the Commissioner/Magistrate was in the way he controlled the hearing?

very fair	<input type="checkbox"/>]	<i>go to Q21</i>
quite fair	<input type="checkbox"/>		
not very fair	<input type="checkbox"/>]	<i>go to Q20(b)</i>
not at all fair	<input type="checkbox"/>		

- (b) In what ways was the Commissioner/Magistrate not fair?

* *Please state all your reasons*

- (c) During the hearing did you feel that you had a reasonable chance to put your side of the case properly?

Yes ☐

No ☐ If no, why not? _____

- 21 (a) How convenient or inconvenient was it for you to go to the hearing?

very convenient	<input type="checkbox"/>	}	<i>go to Q22</i>
quite convenient	<input type="checkbox"/>		
neither convenient nor inconvenient	<input type="checkbox"/>		
quite inconvenient	<input type="checkbox"/>	}	<i>go to Q26(b)</i>
very inconvenient	<input type="checkbox"/>		

- (b) Why was it inconvenient?

* *Tick one or more boxes*

it took too long	<input type="checkbox"/>
wrong time of day	<input type="checkbox"/>
transport	<input type="checkbox"/>
location of court	<input type="checkbox"/>
difficulties with work	<input type="checkbox"/>
family arrangements	<input type="checkbox"/>
other * <i>please state</i>	<input type="checkbox"/>

22 (a) Did you take time off paid employment to attend the hearing?

Yes ☐ → *answer Q22(b), (c), (d)*

No ☐ → *go to Q23*

(b) How many hours did you take off to attend the hearing?

two hours or less ☐

over 2 hours, up to 4 hours ☐

over 4 hours, up to 6 hours ☐

over 6 hours* ☐

(please state how many)

(c) Did you take annual leave?

Yes ☐

No ☐

(d) Did you lose any pay?

Yes ☐

No ☐

23 (a) Did you have to make special arrangements to have your children looked after?

Yes ☐ → *answer Questions 23(b), (c) and (d)*

No ☐ → *answer Questions 23(c) and (d)*

(b) For how many hours did you have to have your children looked after?

two hours or less ☐

over 2 hours, up to 4 hours ☐

over 4 hours, up to 6 hours ☐

over 6 hours* ☐

*(*please state how many)*

(c) Would you prefer that NIGHT Court sittings be made available for the Small Claims Court?

Yes ☐ → *(Please indicate what night or nights and what times you think would be best for night time court sessions)*

No ☐

(d) Would you be in favour of Saturday sittings?

Yes ☐

No ☐

THE OUTCOME

24 After the Small claims Court came to a decision and made an order -

(a) did you or the claimant apply for, and get, a rehearing of the claim?

No, claim was not reheard ☐ → go to Q25

Yes, claim was reheard ☐ →

Please answer Q25-34 in relation to the outcome of the REHEARING rather than the first hearing.

25 Which of the following statements would you say best describes the outcome of the hearing?

You and the claimant reached an agreement ☐ → go to Q28

The Commissioner/Magistrate made a decision ☐ → go to Q26

26 Did the Commissioner/Magistrate explain the reasons for his decision?

Yes ☐ → go to Q27

No ☐ → go to Q28

Partially ☐ → go to Q27

27 How well did the Commissioner/Magistrate explain his reasons for coming to the decision?

very well ☐

quite well ☐

not very well ☐

not at all well ☐

28 Would you say the agreement/decision was in your favour?

Yes ☐

In part ☐

No ☐

29 Looking back, how fair was the agreement/decision?

- very fair ☐
- quite fair ☐
- not very fair ☐
- not at all fair ☐

30 Which of the following statements would you say best describes what you wanted to happen at the hearing immediately before it started?

- I wanted to try to come to an agreement with the claimant ☐
- I wanted the Commissioner/ Magistrate to make the decision . . ☐
- Other * (*please state*) ☐

31 Had you made up your mind before the hearing how much you were prepared to compromise by?

- Yes ☐ → go to Q32
- No ☐ → go to Q33

32 Did you compromise more than you intended?

- Yes ☐
- No ☐

33 Do you think that you compromised more than was fair?

- Yes ☐
- No ☐

AFTER THE HEARING

34 Did you know that you could not appeal against the order?

Yes ☐

No ☐

PAYMENT OF ORDER

35 Do you consider that the final order was -

in your favour ☐ → *please answer Q36-39*

not in your favour ☐ → *please answer Q40-42*

ORDER IN YOUR FAVOUR - QUESTIONS 36-39

36 Was the order -

a payment to be made to you or your insurance co ☐

goods to be supplied to you ☐

work to be done for you ☐

a declaration that you were not liable ☐

a reduction in the amount to be paid by you ... ☐

other * (*please state*) ☐

37 Has this happened -

in full ☐ → *go to Q38*

in part ☐]

not at all ☐] → *go to Q39*

38 How long did it take from the time of the order until you received the full payment?

7 days or less	<input type="checkbox"/>] go to Q 39
over 7 days up to 14 days	<input type="checkbox"/>	
over 14 days up to 21 days	<input type="checkbox"/>	
over 21 days up to 28 days	<input type="checkbox"/>	
over 4 weeks up to 6 weeks . . .	<input type="checkbox"/>	
over 6 weeks up to 8 weeks . . .	<input type="checkbox"/>	
over 8 weeks* (please state) . .	<input type="checkbox"/>	

39 (a) Have you taken any steps to enforce payment?

Yes ☐ → go to Q43

No ☐ → go to Q39(b)

(b) IF NOT PAID IN FULL: Why haven't you taken any steps to enforce payment?

* Please state all your reasons, then go to Q43

ORDER NOT IN YOUR FAVOUR QUESTIONS 40-42

40 Was the order -

a payment to be made by you or your insurance co	<input type="checkbox"/>
goods to be supplied by you	<input type="checkbox"/>
work to be done by you	<input type="checkbox"/>
claim was dismissed, struck out or no jurisdiction	<input type="checkbox"/>
other * (please state)	<input type="checkbox"/>

41 (a) So far, have you done this -

- | | | | |
|------------|--------------------------|---|--------------|
| in full | <input type="checkbox"/> | → | go to Q42 |
| in part | <input type="checkbox"/> |] | go to Q41(b) |
| not at all | <input type="checkbox"/> | | |

(b) Why have you not followed the order?

* *Please state all your reasons*

42 Have any court enforcement procedures relating to your Small Claims order been taken out against you?

- | | |
|-----|--------------------------|
| Yes | <input type="checkbox"/> |
| No | <input type="checkbox"/> |

OVERALL OPINION

43 (a) If you had another dispute similar to this one, would you use the Small Claims Court ?

- | | | | |
|-----|--------------------------|---|---------------|
| Yes | <input type="checkbox"/> | → | go to Q44 |
| No | <input type="checkbox"/> | → | go to Q 43(b) |

(b) IF NO: Why have you said you would not use the Small Claims Court? * *Please state all your reasons*

44 What do you see as the strengths, or good points, of the Small Claims Court?

45 What do you see as the weaknesses, or bad points, of the Small Claims Court?

46 Do you have any suggestions for improving Small Claims Courts?

47 (a) How many times have you been involved in the Small Claims Court as - * *fill in BOTH boxes*

	Number
A claimant	<input type="text"/>
A respondent	<input type="text"/>

47 (b) How many times have you been involved in debt proceedings in the Court of Requests as - * *fill in BOTH boxes*

A plaintiff	<input type="text"/>
A defendant	<input type="text"/>

48 On a scale of 1 (very unsatisfied) to 10 (very satisfied) how would you rate your satisfaction with the Small Claims Court?

(Circle one)

unsatisfied 1-2-3-4-5-6-7-8-9-10 → satisfied

If you are a business or organisation, please stop here.

Thank you for your time and thoughts.

If you were not defending on behalf of a business or organisation but as a PRIVATE INDIVIDUAL, please answer questions 49-55 so that we may evaluate how well the court is serving particular groups. Again all information will be kept in the strictest confidence and no individuals identified. However, if you have strong objections about any particular questions, we of course respect your feelings and thank you for completing what you can.

BACKGROUND

Finally, we would like to ask you a few questions about yourself and your background.

49 Sex: male ☐
 female ☐

Approximate Age: _____
 Country of birth: _____
 If not born in Australia, how long
 have you lived in Australia: _____

50 What is your current main job? _____ (Please try to describe briefly
 what you do and your place of work, eg teacher in a large high
 school, clerk in a small factory, mother with young children).

51 What is the highest level of education you have completed?

- Completed Technical College or University ☐
 Some Technical College or University ☐
 Trade Certificate ☐
 Completed secondary school (Year 12) ☐
 Some secondary schooling ☐
 Completed primary school ☐
 Some primary schooling ☐

52 What is your estimated annual income before tax? (If retired please indicate income in your last year of employment).

nil	<input type="checkbox"/>
\$1 - \$9,999	<input type="checkbox"/>
\$10,000 - \$19,999	<input type="checkbox"/>
\$20,000 - \$29,999	<input type="checkbox"/>
\$30,000 - \$39,999	<input type="checkbox"/>
\$40,000 - \$49,999	<input type="checkbox"/>
\$50,000 or over	<input type="checkbox"/>

53 Present marital status -

married, or living in a defacto relationship	<input type="checkbox"/>
not married	<input type="checkbox"/>
separated, divorced	<input type="checkbox"/>
widowed	<input type="checkbox"/>
other * (please state)	<input type="checkbox"/>

54 What is/was your spouse's/partner's occupation?

* Please be specific, eg, primary school teacher, mechanical engineer

55 What is the estimated annual income of your spouse/partner before tax? (Again, if retired, please use last year of employment).

nil	<input type="checkbox"/>
\$1 - \$9,999	<input type="checkbox"/>
\$10,000 - \$19,999	<input type="checkbox"/>
\$20,000 - \$29,999	<input type="checkbox"/>
\$30,000 - \$39,999	<input type="checkbox"/>
\$40,000 - \$49,999	<input type="checkbox"/>
\$50,000 or over	<input type="checkbox"/>

THANK YOU AGAIN FOR YOUR CO-OPERATION

Could you please post this questionnaire as soon as possible.

Appendix CS

Small Claims Court Evaluation

Respondents who complete prior to hearing

INSTRUCTIONS

Please answer the questionnaire in relation to your experience with the Small Claims Court

Please answer by ticking a box or writing comments in the space provided.

Tick one box only unless asked to tick more than one.

Please return the questionnaire as soon as possible (preferably within three days) in the enclosed addressed stamped envelope.

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THANK YOU!

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RESPONDENT QUESTIONNAIRE

Tick one box only unless asked otherwise

THE DISPUTE

1 How long had you been aware of the dispute (ie problem or disagreement) before the claimant filed a claim at the Small Claims Court?

1 month or less ☐

over 1 month, up to 3 months ☐

over 3 months up to 6 months ☐

over 6 months up to 1 year ☐

over 1 year up to 18 months ☐

over 18 months ☐

2 (a) Had you asked for help or advice in settling the dispute before the claim went to the Small Claims Court?

Yes ☐ → go to Q 2 (b)

No ☐ → go to Q 3

(b) IF YES: Whom did you ask? _____

Please state who they are, eg, family member, friend, lawyer, rather than their name

FILE THE CLAIM

Was the claim transferred from the Court of Requests?

Yes ☐

No ☐

(a) Did you ask the court staff for information or assistance after you received notice that the claimant had filed a claim in Small Claims?

Yes ☐ → go to Q4(b)

No ☐ → go to Q5

(b) How helpful were the court staff?

- | | | | |
|--------------------|--------------------------|---|-------------|
| very helpful | <input type="checkbox"/> | } | go to Q5 |
| quite helpful | <input type="checkbox"/> | | |
| not very helpful | <input type="checkbox"/> | } | go to Q4(c) |
| not at all helpful | <input type="checkbox"/> | | |

(c) In what ways were the court staff not helpful?

* Please state all your reasons

5 Would you have liked more help in responding to the claim?

Yes ☐

No ☐

SETTLEMENT

6 Did you reach a settlement with the claimant?

Yes ☐ → Go to Q7

No ☐ → Go to Q11

7 Was your dispute settled -

on the day of the hearing ☐

before the day of the hearing ☐

8 Looking back, how fair was the settlement?

very fair ☐

quite fair ☐

not very fair ☐

not at all fair ☐

Do you think you compromised more than was fair?

Yes ☐

No ☐

Do you think that you would have come to a settlement if a claim had not been filed in the Small Claims Court?

definitely yes ☐

probably yes ☐

probably no ☐

definitely no ☐

OVERALL OPINION

1 (a) Do you think that a Small Claims Court should be used to resolve disputes of the type you were involved with?

Yes ☐ ➔ Go to Q. 12

No ☐ ➔ Go to Q. 11(b)

(b) IF NO


Why have you said Small Claims Courts should not be used to resolve the types of disputes you were involved in?

**Please state your reasons*

2 On a scale of 1 (very unsatisfied) to 10 (very satisfied) how would you rate your satisfaction with the Small Claims Court?

(circle one)

1-2-3-4-5-6-7-8-9-10

unsatisfied  satisfied

- 13 What do you see as the strengths, or good points, of the Small Claims Court?

- 14 What do you see as the weaknesses, or bad points, of the Small Claims Court?

- 15 Do you have any suggestions for improving Small Claims Courts?

- 16 How many times have you been involved in the Small Claims Court as - * *fill in BOTH boxes*

Number

A claimant ☐

A respondent ☐

- 17 How many times have you been involved in debt proceedings in the Court of Requests as - * *fill in BOTH boxes*

A plaintiff ☐

A defendant ☐

If you are a business or organisation, please stop here.

Thank you for your time and thoughts.

If you were not defending on behalf of a business or organisation but as a PRIVATE INDIVIDUAL, please answer questions 18-24 so that we may evaluate how well the court is serving particular groups. Again all information will be kept in the strictest confidence and no individuals identified. However, if you have strong objections about any particular questions, we of course respect your feelings and thank you for completing what you can.

BACKGROUND

Finally, we would like to ask you a few questions about yourself and your background.

18 Sex: male ☐
 female ☐

Approximate Age: _____
 Country of birth: _____
 If not born in Australia, how long
 have you lived in Australia: _____

19 What is your current main job? *(Please try to describe briefly what you do and your place of work, eg teacher in a large high school, clerk in a small factory, mother with young children).*

20 What is the highest level of education you have completed?

- Completed Technical College or University ☐
 Some Technical College or University ☐
 Trade Certificate ☐
 Completed secondary school (Year 12) ☐
 Some secondary schooling ☐
 Completed primary school ☐
 Some primary schooling ☐

- 21 What is your estimated annual income before tax? (If retired please use your last year of work).

nil	<input type="checkbox"/>
\$1 - \$9,999	<input type="checkbox"/>
\$10,000 - \$19,999	<input type="checkbox"/>
\$20,000 - \$29,999	<input type="checkbox"/>
\$30,000 - \$39,999	<input type="checkbox"/>
\$40,000 - \$49,999	<input type="checkbox"/>
\$50,000 or over	<input type="checkbox"/>

- 22 Present marital status -

married, or living in a defacto relationship	<input type="checkbox"/>
not married	<input type="checkbox"/>
separated, divorced	<input type="checkbox"/>
widowed	<input type="checkbox"/>
other * (please state)	<input type="checkbox"/>

- 23 What is/was your spouse's/partner's occupation?

* Please be specific, eg, primary school teacher, mechanical engineer

- 24 What is the estimated annual income of your spouse/partner before tax? (if retired please refer to last year of work).

nil	<input type="checkbox"/>
\$1 - \$9,999	<input type="checkbox"/>
\$10,000 - \$19,999	<input type="checkbox"/>
\$20,000 - \$29,999	<input type="checkbox"/>
\$30,000 - \$39,999	<input type="checkbox"/>
\$40,000 - \$49,999	<input type="checkbox"/>
\$50,000 or over	<input type="checkbox"/>

THANK YOU AGAIN FOR YOU CO-OPERATION.

Could you please post this questionnaire as soon as possible.



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Appendix Cb

EEC:smb

31 August 1990



On behalf of the University of Tasmania, the Law Faculty and the Law Society of Tasmania, I would like to ask you to take a few minutes of your time to complete this very important survey questionnaire, which is enclosed, regarding your experiences before the Tasmanian Small Claims Court.

This research project is being conducted by Eugene Clark who is a lecturer in law at the University. It has been funded by grants from the Tasmanian Law Foundation and a University Research Grant.

It is my belief that the results from this survey will significantly aid us in assessing the extent to which the Small Claims Court has achieved the purposes for which it was established five years ago. Moreover, the nature of this research will hopefully provide a useful evaluation model of judicial administration which will be of interest to scholars throughout Australia and overseas.

Thank you again for playing a vital role in this important research effort and for doing your part in helping to bring about a Legal System which is more responsive to the needs of you, its citizens.

Should you have any questions about the survey or need any assistance in completing it, please phone Eugene at (002) 20 2075 or leave a message at 20 2073. Finally, could you please return the questionnaire as soon as possible.

Again, many thanks for your assistance.

Very truly yours,

Professor Don Chalmers
Head of Department
Law Faculty



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APPENDIX
C 7



A Gentle Reminder!

A few weeks ago we sent you a questionnaire asking for your help in evaluating the success of the Small Claims Court. Our records indicate that we have not yet heard from you. If the record is in error or you have recently returned the survey form, please disregard this notice.

If you have not yet returned the questionnaire, would you please do so today? There is no need to put a stamp on the enclosed addressed envelope previously sent to you because it contains a Free Post number.

We really appreciate and value your reply, which will be kept in the strictest confidence. Again, if you have any questions or need an additional copy of the survey, please write or phone Eugene Clark at the University of Tasmania, Law Faculty, Box 252 C, Hobart 7000 (ph: 20-2075 ,or leave a message on 20-2073. In the evenings, phone 25-1115).

Again, many thanks for your participation and help in this research project.

Yours sincerely

E. Eugene Clark
Lecturer in Law

Appendix D

FILE AND ADMINISTRATIVE SURVEY

1. Introduction

1.1 Purpose of the File Survey

The purpose of this survey is to give a Statewide overview of the Small Claims system in Tasmania. In particular this overview describes: 1) the nature and scope of claims; 2) the process of claims through the Small Claims Court; 3) the outcome of claims; 4) the payment and enforcement of orders.

1.2 Data Source

The source of the data from the file survey is derived from the Small Claims files from the period June 30, 1988 through July 1, 1989. These dates allowed sufficient time for most claims to proceed through all stages from filing through conclusion. The data was collected from all four major population centres: Hobart, Launceston, Burnie and Devonport.

While the files provide a valuable source of information about the system as a whole, the researcher was frustrated at times by missing files, inconsistent documentation, illegible handwriting and varying record keeping procedures. Despite these drawbacks, data obtained from the files provides some very useful information about the overall Small Claims system.

The file survey data was later compared to the census data for Tasmania and the greater Hobart area in order to check the representativeness of the survey sample and to determine how representative the Small Claims disputants were of the total population.

Appendix E

Summary of Interviews

1. Introduction

This case study is one part of the overall evaluation of the Tasmanian Small Claims Court. It is ethnographic in nature and provides qualitative data on how the Small Claims Court operates and are perceived by the people involved in them.

2. Methodology

Interviews were conducted with people in four main groupings: 1) Magistrates of the Small Claims Court; 2) Court personnel; 3) supporting groups such as Consumer Affairs, Legal Aid, Legal Referral, and the Trade Practices Commission; and 4) insurance companies. Most of the interviews were recorded and transcribed, with a draft transcription returned to the interviewee for correction and additional comments. A few of the interviews were less formal, with the researcher making notes immediately after the session. In the case of Consumer Affairs, the researcher conducted a group interview which was recorded with a record of main points circulated afterwards for correction and further comments. The interviews were generally structured to address, in chronological order, the various stages/aspects of Small Claims: pre-hearing matters, the Small Claims hearing, post hearing matters and Court administration. Finally, though not reported here, the researcher was aided by the opportunity to interview several Small Claims Magistrates/referees in other Australian jurisdictions as well as reports from similar interviews conducted as part of similar evaluations in New Zealand¹ and the United States².

The report is divided into issues which are discussed generally in chronological order, starting with publicity and awareness of Small Claims Court through to the hearing and enforcement stages.

¹A. Lee and K. Sullivan, *Small Claims Tribunal Evaluation: Volume 2 Research Reports* (1986) Study Series 17, Policy and Research Division, Department of Justice, New Zealand.

²See e.g. S. Elwell and C. D. Carlson, 'The Iowa Small Claims Court: An Empirical Analysis' (1990) 75(2) *Iowa Law Review* 433, 440.

3. Magistrates

3.1 Introduction

Since its inception in September 1985, the Tasmanian Small Claims Court has had two full time Commissioners (now Magistrates). These Magistrates have handled the lion's share of cases, however, they have been assisted from time to time by Court of Requests Magistrates who, because of the rapidly growing Small Claims case load, have been assigned to assist in the Small Claims division. These part-time Small Claims Magistrates adjudicate only motor vehicle cases, which as indicated in the File Survey Results presently constitute almost half of the total cases filed. The information below is based on an extensive interview with Mr Michael Hill, the past, and Tasmania's first, Small Claims Magistrate and extensive formal and informal interviews with Mr Andrew Hemming, the present full-time Magistrate. In addition, five part-time Magistrates were interviewed, some informally others formally: Mr Sikk, Mr Chen, Mr Morris, Mr Bryant, and Mr Wooley

3.2 Philosophical issues

3.2.1 Justice for the ordinary person

One theme which emerges from the Small Claims and alternative dispute resolution literature is the role of Small Claims in giving the ordinary person access to the judicial system in minor disputes. As Mr Hemming put it:

[I]t [Small Claims] provides a low cost accessible forum for people who want to settle their very real personal disputes they have with other members of the general public without the need of necessarily going through a rigid Court procedure to do it.

The importance of empowering people, giving them confidence in conducting their own case before Small Claims, was reinforced by Magistrate Hill when addressing the importance of the Magistrate speaking at Rotary Clubs and other community groups:

They were very important PR exercises. I distributed pamphlets, gave out copies of the forms and told them how the

Court worked. It is very important for people to feel that they can do it themselves, to get the perception that they can do it. If they just hear the words "Small Claims Court" they might be intimidated. But if they hear the average claim is 30-40 minutes (about the same as a dentist-sometimes more painful, sometimes less) and both sides just tell their story, no fisticuffs and you can ask questions of each other, and at the end of the day I say "you win, you lose"--they get a perception that it is their Court. If you can keep it simple, they get attracted to it. If you don't sell it people fade away and don't use it.

3.2.2 Low cost and speedy justice

As Magistrate Hill put it: 'This jurisdiction (Small Claims) can really rattle the cases through and that's what it is all about - expedient, quick justice

Magistrate Sikk, reflected that the system has been a great success in providing a cost efficient, speedy and fair system for handling small claims.

3.2.3 Class action

Several of the Magistrates interviewed favoured the introduction of some type of class action procedure in Small Claims. Even without amending the existing legislation, Mr Sikk could see no reason why the Court couldn't advertise a particular case and invite any other claimants with the same legal and factual issues to also submit a claim.

3.3 Jurisdiction

3.3.1 Type of case

M. Hill mentioned that, when the Tasmanian system was first created, Victorian Small Claims people cautioned landlord/tenant disputes would flood the system. Indeed, this happened to such an extent in Victoria that they had to establish a separate tribunal. However, that problem has not occurred in Tasmania. Mr Hemming indicated he had given some thought to the idea of personal injury cases, but the complexities of such cases, especially evidentiary matters would likely require legal representation.

Regarding the types of cases which may be heard in Small Claims, each of the Magistrates was asked whether there was any concern that motor vehicle accident cases no comprise almost 50% of the total number of claims.

A I don't think there is a problem with injustice. I guess it's just a sign of the times. It's difficult because the Court of Requests has jurisdiction of those claims too. I don't know how many transfer over.

In sum, there was unanimous approval regarding the type of cases presently heard by the Small Claims division.

3.3.2 Monetary limit

The vast majority of Magistrates felt that the jurisdictional limit should be raised. In fact, when one considers the initial limit of \$2000 established in September 1985, inflation figures alone suggest that the Small Claims Court limit is ripe for review. The major exception was Mr Chen who felt the amount should be lowered to \$1000 except for motor vehicle cases in which the amount should stay the same. However, there was a division of opinion regarding the extent to which the jurisdictional limit should be increased. Mr Hill felt that it should not go above \$3000. Most suggested it should be increased to \$5000 to be consistent with the majority of Australian states. However one Magistrate would like the jurisdiction increased to \$10,000. Also, all noted that an increase in jurisdictional limit for Small Claims would require a corresponding increase in the limit for the Court of requests.

It was also noted that on a purely economic basis too, it is more efficient (less expensive) to have a case tried in Small Claims than the Court of requests. The other side of the argument is that the more serious the amount of money becomes, one is no longer talking about 'small' claims. Moreover, the more serious the claim, the more important it is that people have an access to legal representation, something which is denied in Small Claims Court. Thus Mr Chen cautioned that, absent the procedural and evidentiary safeguards present in a formal adversary system in which professional advocates represent the disputants, it is only very 'rough' justice which is achieved.

3.4 Community awareness of Small Claims

Mr Hemming noted that the dramatic increase in number of small claims provided some evidence that the system must be working well and that people were finding out about it. Nevertheless, most Magistrates agreed that more publicity was needed, though a caveat was expressed that the resources of the system were already under significant strain.

Again, Mr Hill's response was representative:

Q. Do you think Small Claims should be advertised more, for example, you mentioned speaking to various community groups?

A Definitely so. I know I visited all the Rotary clubs. I remember speaking to one group as small as 6 in Lindisfarne (a number of business people were thinking of using the Court to pump through their debt collections and I talked them out of that. It was before the Act was amended to require a dispute) and another meeting of 140 + at the Hobart Rotary Club. That was quite an experience. They were very important PR exercises.

3.5 Informing people about the Small Claims Court

Related to the issue of general public awareness of the Small Claims Court is the need, in a forum where people conduct their own case, for accurate information about Small Claims procedures. All the Magistrates agreed that the more prepared people are, the better Small Claims can function and carry out its goal of providing affordable, speedy and fair dispute resolution..

Magistrates noted the existence of a Small Claims booklet available to disputants in Small Claims. It has undergone several changes and seems to be getting better all the time. Most Magistrates also agreed it would be an excellent idea to have a video on Small Claims which could be either viewed at the Court or checked out by a disputant after paying a small security deposit.

3.6 Claim form

Most litigants have little difficulty with the claim form. Typical was the response of Mr Hill.

Q. What about the claim form? Is your perception that litigants could understand it and fill it out appropriately?

A. Apart from motor vehicle accidents where we had trouble about where parties put the insurance company, placed their diagrams etc. (in my experience motor vehicle cases bring about a certain intensity in people which induces them to write everything that has happened from the day they bought the car to the day they had the accident). Other than that I didn't have much feedback from the Registrars that people had much trouble. So I would have to say that the claim form, drafted with the help of Peter Maloney from the Law Department (now Justice Department) stood the test of time reasonably well. Though with motor vehicles now having their own form, I think that's right because the information needed is different.

3.7 Role of insurance companies

Generally, some of the Magistrates expressed concern about the abuse of the system by some insurance companies. This abuse took several forms: First, there was the problem created by the situation in which one party is represented by an insurance company but the other has no representation. Typical of the responses was this from Magistrate Hill:

Q. Did you have many insurance agents participate in the hearing?

A Yes I had a lot.

Q What about where you had an insurance agent on behalf of one party but no one with the other party.

A That was a situation I tried to address by giving the other party help. I would say to the other party that the insured party is allowed to have their representative, I'll give you the opportunity to have someone represent you or to adjourn the matter to see your solicitor. Usually they would say, that's

ok, I'll be all right. I also explained that the insurance agent's role was not necessarily to cross-examine, but to sit there and produce evidence of the accident scene, etc and to assist the Court. I know that's a little different, that if you let them in as a party, you should let them in completely, but I tried to make it so that the unrepresented party wasn't put to a disadvantage. I didn't perceive any disadvantage. If they were a little rattled by it they could adjourn and come back with someone else to help them. And if they were disadvantaged you could tell, you could feel it. Also if the insurance agent or one party was being too aggressive I would get them to back off.

A second, but related, problem is that some insurance representatives appear regularly in Small Claims, thus developing some expertise and becoming 'educated' in its operation. The danger then exists that the unrepresented party will be significantly disadvantaged.

Q Did you get many insurance people who sat in on 10-20 cases and therefore developed some expertise in Small Claims?

A I was able to communicate on an informal basis that I didn't want to see a company send the same person all the time so that they could say they were an expert about it. They cooperated with that and I must say that most agents were a help rather than a hindrance.

In contrast, Mr Hemming thought the insurance representatives did not present a problem and at worst were 'well meaning amateurs'.

A third problem is that in some cases the insured is clearly liable, yet the insurance company, through its insured, disputes the claim in Small Claims. One Magistrate noted that in this situation he often asks the party why they are there, when the liability is clear. The usual response is that the insurance company told them to be.

A fourth problem perceived by some Magistrates is that the large numbers of cases, filed en masse, threaten to drive other litigants, for example, individual consumers, out of the system. Other Magistrates, however, noted that the legislation states that

insurance companies are permitted to use the Court, thus they are simply exercising their rights under the legislation.

A final problem in regard to insurance companies is the legal question of their legal status. Interestingly, there is a variety of legal opinions reflected in a range of policies adopted by different Magistrates. This was explained by Mr Hemming:

Some Magistrates won't let them [insurance representatives in full stop. Others will let them in to the extent they will let them sit, sit quiet. I take the view that whatever evidence they can give me, I will permit them to do so; even to the extent of participating in cross-examination because I've always joined them as interested parties.

Some areas need to be clarified as to whether they [insurance companies] are or are not an interested party. There is some doubt as far as some Magistrates are concerned. I must say I have never had any doubts about it. Clearly the definition of an interested party under the Act is someone who has an interest in the settlement of the dispute and if an insurance company doesn't have that sort of interest, then who does? .

Most of the Magistrates also acknowledged that there were also advantages about insurance company representation. Many representatives provided a useful service to the Court by informing clients about Small Claims procedures, ensuring that all the material facts were before the Court, assisting litigants in the presentation of their case, etc.

3.8 Role of debt collectors

In Mr Hemming's view and that of several others was that collection agencies are the major abusers of the Small Claims system. The Tasmanian legislation does not permit Small Claims procedure for the collection of a liquidated debt about which there is no dispute. Many collection agencies, however, 'manufacture' a claim which is in reality a disguised debt collection. As Mr Hemming noted:

I've had lots of complaints from people who have said :
"Look, all I want to do is to sit down with the collection service

and negotiate this thing out. But, they were so unbending in their attitude that they had to pay the full amount or else

3.9 Migrants

All of the Magistrates expressed the view that the Tasmanian Small Claims system worked well for migrants. In part this was due to the fact that compared to other jurisdiction, for example Melbourne, there were fewer non-English speaking migrants in Tasmania. Also, interpreters were readily available and Magistrates would allow a family member or friend to come along if that was deemed necessary.

3.10 Conciliation/settlement

The Tasmanian legislation provides that the primary function of the Magistrate is to attempt to bring the parties to a settlement. While parties may agree to settle on their own, the Tasmanian scheme provides two possible opportunities for settlement to occur: 1) at a pre-trial conference conducted by a Court Registrar or other Court officer; and 2) an attempt made by the Magistrate just prior to the formal hearing taking place

3.10.1 Conferences conducted by the deputy-Registrar or other Court officer.

All the Magistrates agreed this aspect of Small Claims required more emphasis. This pre-hearing procedure has two major purposes: to ensure that the matter is ready for hearing; and two, to investigate the possibility of settling the claim. Conferences are conducted by the Magistrate as well as other Court officers as permitted in the legislation.

The advantages of pre trial conferences conducted by the deputy Registrar were described by Mr Hill, who was one of the initiators of the idea.:

They (Melbourne) have a system where the Registrars would have a preliminary discussion with the parties, clarify the issues and get some idea of how long the matter would take, and see if the parties might settle. I set up a system, which is now in the regulations, where the Registrars would pick cases where there might be some hope of settlement. There's

several advantages to these conferences: clarify the issues, see if the parties might settle, etc. Sometimes they would settle and I would simply make a consent order.

Presently there are a number of problems in regard to conferences and the role of settlement/conciliation in Small Claims. The first problem, suggested above, is that there are not enough conferences ordered. This is seen as a resource problem. Most of the Small Claims support staff also have many other duties in connection with Small Claims and the Court of requests. Thus, the time they have available to devote to conferences is extremely limited. The second problem is expertise: Staff, including the Magistrate, have been given no training in conciliation/mediation techniques. Moreover, it is difficult to develop an expertise in the area when it is done on such a fragmented basis.

A third difficulty involves the issue of cost. This was highlighted by Mr Hill:

I had talked to Melbourne about it and they weren't in favour of the idea. They were a no cost jurisdiction and if you have people coming for a conference and the other side doesn't show it, you significantly add to the cost of a Small Claims dispute- and I can see the argument, especially if you have someone travelling in from Huonville or something like that and the other other party doesn't show, you've wasted a whole day. Putting that to one side I still thought it a useful concept.

3.10.2 Pre-hearing conferences conducted by the Magistrate immediately prior to the hearing.

Most Magistrates note that a significant number of cases do in fact settle (20-30% stated Mr Hill). However, there was universal agreement that this aspect of the Court required more emphasis.

While the Magistrate may order a pre-hearing conference, much more common is a brief conference conducted by the Magistrate just prior to the hearing. to investigate the possibilities of settling the case. This procedure has some of the same difficulties mentioned above: the Magistrate is unlikely to have any training in

conciliation/mediation techniques and the demands of a heavy case load mean there is little time available.

More fundamental issues however involve the degree of compulsion and fairness of existing procedures. The Magistrates themselves were quite perceptive about these problems, many of which are also noted in the literature about Small Claims and alternative dispute resolution

So what we have here and what I have put in place (I don't know about Andrew now) is not really a mediation or settlement exercise. What I used to tell people is the primary function of the exercise is to settle and I got some tips from Melbourne about it. What they use to tell them is that it was a money exercise. It was all about dollars and cents and you had to put aside your bitterness and other problems and think about dollars and cents and forget about who is right and who is wrong. Now if you are talking about a motor vehicle accident where someone has left their car parked and another party has backed into them, it is pretty hard to get the guy who has parked his car to understand, why he should settle. So down here the settlement aspect doesn't fit tortious matters all that comfortably. So I said to the parties, look it's a money exercise, so calm down about it. If you make the decision yourselves you are more likely to live with it. I'll give you five minutes on your own to talk about it. If you can't settle by that time I'll come back and make a decision. At that point I walked out and let them go to it. Obviously there were times when you couldn't do that, for example when one party was aggressive and dominant. I don't know what the figures were but we were settling (the system, not me personally) about 20% to 30%. So getting back to what you were saying, training and mediation may not have helped much. Then again, if I had been better trained as a mediator, then maybe I would have had a greater number of direct settlements, but the way I ran it it didn't matter because I let them to it. In fact I have always had conceptual difficulties with the Tasmanian model because if you talk to people about settling and then they say we can't and you have to decide it. Then in their

eyes, some think you are biased. Then you have to decide in accordance with the law. Yet if you were privately advising them about the law your advice might be they shouldn't settle. I found that difficult to weigh up. I don't think you can do about it. It's a philosophical problem but it's one which makes it difficult for Commissioners and I know that Magistrates, who over a period of time have adjudicated Small Claims, have great difficulty with that concept. I suppose that while I had this conceptual difficulty, in practical terms I didn't let it affect the way I ran the Court. So I didn't let people know I was having these philosophical problems with the legislation. That's the last thing they want to know about.

Mr Hemming also pointed to the need for more training in mediation/conciliation and to the fact that special skills are required:

I probably started more legalistically than I do now. I spend more time on settlements now. I think I'm better at picking the people what are likely to settle than I was when I started. Then, I tried the same standard routine with everybody and really, felt, I had no experience to be able to tell where to go from the initial blank response or negative response from the initial request of settlement. These days I will tend to assess the parties better and be able to suggest something. As an example, in the old days, when I first started I used to go into a room and leave them to get on with it in terms of settlement which was invariable hopeless because they just sit there and argue with each other. So now I take a much more active part; I set in with them and encourage them to the extent that I'll even suggest a figure for settlement and nine times out of ten that is the figure that will be settled upon.

Another fundamental problem involves the principle of impartiality. A role conflict exists between the duty of the Magistrate to attempt settlement, a task which requires an inquisitorial posture in which the Magistrate is actively involved. Should the negotiations fail, however, the case must then be heard in a more formal adversarial context involving sworn testimony, examination and cross examination in which the same Magistrate must assume a more impartial, adversarial posture.. This role conflict

is made even more dramatic in Tasmania because there is no right of appeal and one Magistrate decides the bulk of Small Claims cases.

Again, as Mr Hill observed:

You see the fact that there is effectively no right of appeal in the Small Claims Court made it awkward. And it was even more so because I was the only one who did it. So no matter where you went, Burnie, Devonport, Hobart or Launceston, I was the same face you saw.

3.11 Part-time Magistrates

Part-time Magistrates appeared particularly uncomfortable with the inquisitorial aspects of Small Claims which was in marked contrast to the adversary system in which the judge plays a passive role. Mr Chen's comments are typical:

I don't know why, I suppose it is because the absence of counsel makes a big difference. there is an understanding between the counsel and the Bench in all Courts, certain behaviour procedures are adopted and cause any litigation to run fairly smoothly. but where you are dealing with two people who are completely strange to any sort of procedure, it is quite difficult to keep them on line to get them in the right direction because they tend to fly off in a tangent half the time, particularly when we are talking about matters that are quite clearly hearsay, opinion. They don't understand that they can't say that.

3.12 Presentation of cases/availability and use of witnesses

One criticism of Small Claims procedures which excluded lawyers was that parties would not be able to adequately present their case, Mr Hemming noted that witnesses were called in approximately 50% of the cases. With one exception, all the Magistrates interviewed commented favourably on the general quality of case preparation and presentation found in Small Claims. The comment of Mr Hill was representative of the majority:

I think the vast majority are extremely well prepared. I was surprised by the standard of presentation. When I used to go around to various groups speaking the gospel about Small Claims I always pointed that out. When I think about it it is not that surprising, because in the Court of Requests you seldom get to hear exactly what the parties want to say because their lawyer does the talking or instructs them so what they do say is tailored to what their solicitor's tell them they can say. I had have to say I was very comfortable with the standard of presentation. They had drawings, photographs, etc.

Mr Chen, in contrast, was of the opinion that most disputants in Small Claims are poorly prepared, and tended not to realise the importance of witnesses.

Mr Hemming added the further point that while most disputants aptly explain their side of the case, few are effective at cross-examination. However, even here, with a little assistance from the Magistrate, most disputants do an adequate job.

3.13 Use of Lawyers

All Magistrates preferred the Tasmanian system in which lawyers are generally excluded from the Court, except in certain circumstances. For example, Mr Hill cited a complex nuisance action, another one involving restraint of trade in which it was useful to have lawyers involved.

Insurance agents account for most of the representation occurring in Small Claims, though they arguably are not so much representing the insured as themselves as a party in interest. In addition, Mr Hemming noted that there have been about six requests for moral support with the disputant requesting that a spouse or other friend be allowed to assist them. A few disputants have petitioned the Court to allow legal representation and the Magistrate does allow the disputant and their representative to be heard on that issue. However, the number of requests for legal representation have been small and very few have been granted.

3.14 Informality

Small claims proceedings aim to be informal. There are no strict rules of evidence, the Magistrate is not robed and there is considerable flexibility in most procedures.

According to most Magistrates the degree of formality is 'just about right'. However, it was also observed that degree of formality is very much a matter of a person's personality. While a system in which lay persons conduct their own case demands informality, it was opinion of the Magistrates that some formality was necessary to enable matters to be resolved expeditiously and to maintain an element of control in what can become a very heated atmosphere.

One important element of formality is the physical location of the Magistrate vis-a-vis the litigants. In Tasmania, there is considerable diversity on this matter, with some hearing rooms set up quite informally and others occurring in a formal Courtroom..

Q Were you on the same level as the litigants?

A In Hobart yes. In Launceston, Burnie you were just in the Petty Sessions Court and thus elevated. In Devonport we used the Master's Chambers. In Launceston I used to set in chambers, but after a particularly heated exchange with one of the parties in one case, I decided it would be better to be in open Court. It depends a lot.

3.15 Privacy

Most of the Magistrates favoured private hearings so that the disputants could relax and present their case. As Mr Hill noted:

The Magistrates here sit with their clerk. I never did that. I was always alone with the litigants. Victoria and NSW have the referee and the parties. I found that if anyone else was there the parties didn't like it.

3.16 Physical surroundings/Convenience

Mr Hill described the convenience of Small Claims facilities as follows:

What about overall convenience? Access to the building, provision of child care services, etc.?

A. I think provision of child services would be great. I think the original premises at the bottom of the Executive Building where we had a private entrance were as good as we would get. I had a separate entrance and we had separate chambers. The litigants had an ample waiting room and it was a comfortable area. People seemed to have little trouble finding it.

I think what they have now is an absolute disaster -- People walking up stairs, going through restaurants, and so on and I just think that is totally unacceptable. I think the Court set up and waiting room is ok, but it's getting there and finding it which is not well thought out. That's one of the problems with Small Claims - because of its administrative set up as part of the Court of Requests, it seems to me that you don't necessarily have to have it in the same location (though it's obviously desirable). But if you are going to do that you have to look at the facilities for the public, even more so for the Small Claims Court because it's a people's Court where people conduct their own cases. They ask their own questions; they produce their own evidence. If you're not catering to the people to come before the Court you're failing in my view.

Q What about the facilities in the North and NW?

Well I practiced for 13 years in Launceston and the facilities are good, but not for Small Claims. In my experience they have not been altered in any way to try to cater for Small Claims. I think there has to be some sort of philosophical

acceptance that there is a different theme behind the Small Claims Court than there is behind the ordinary civil Court. If you want to keep it as a Court ok, but you have to show people it is their Court and they can relax in it. If you are going to old stone buildings with the goals in the back, it is not going to do much to encourage people or make them feel relaxed. Devonport wasn't too bad. Burnie again is the Supreme Court Building as well. There are problems in this area and I think there needs to be some addressing of this philosophical approach to Small Claims Court. Although Small Claim litigants are part of the Court system they shouldn't be made to feel that way. It gets back to political will - whether one is prepared to spend the money to provide proper facilities consistent with the philosophy of a Small Claims Court.

Mr Hemming also commented in great detail about the importance of physical setting especially for Small Claims. In the arrangement of the room, the Hobart Small Claims Court is best. The parties face the Court rather than each other, though the chairs are swivelled so that they can face each other for questioning if necessary. The Magistrate is slightly elevated, but not nearly so much as in an ordinary Court. The Devonport Courtroom which consists of the old judges chambers is most inappropriate. With the exception of Hobart, there are no separate waiting rooms for Small Claims. This means that small claim disputants are mingled with criminal defendants, a factor which some disputants have complained about and not the best atmosphere to encourage people to utilise the system.

In Burnie and Launceston Small Claims are conducted in the normal Courtroom, which is viewed as inappropriate for Small Claims.

Hobart, though generally the best setting, also has its problems. The waiting room is connected to the hearing room so that parties are forced to confront each other while they wait. Also, those waiting can hear speakers in the hearing room. Because the hearing room is located directly above a retail store selling phonograph equipment, Court proceedings are sometimes interrupted by loud music when a prospective customer downstairs wants to test the speakers. The downtown location of the Court makes parking difficult. Sign posting, though adequate in Hobart, is non-existent in Devonport and virtually so in Launceston.

3.17 Evening and Saturday sittings

Some Magistrates were in favour of after working hours sittings but noted it would add to the difficulties of the full-time Small Claims Magistrate who was already subject to a heavy case load. However, it was noted that the appointment of part-time Magistrates would alleviate this problem. Others stated that they didn't believe consumers really want it. People wouldn't give up their free time to attend Small Claims, especially when employers will usually let people off during business hours to attend their case. Other practical problems involved having to pay penalty rates, building security, support staff etc.

Mr Hill: observed that:

Night sessions, I must say, haven't been very popular in Petty Sessions, but then again you can't win there. Why pay a fine when when you can be home watching tv. In Small Claims you might be more motivated because it's your own claim and you can win something. It is something which should be experimented with, particularly in light of the backlog.

Mr Hemming was a strong advocate of piloting an evening session which he stated is planned for the near future.

3.18 Giving reasons for decisions

Though not required by statute to give reasons for their decisions, all Magistrates indicated that they did so.

Mr Hill:

Yes. I always made it a point of saying the claimant wins because of 1, 2, 3. It's difficult to look someone in the eye from a distance of 6 ft and say you don't believe what they say, but you have to do it because they have to know at the end of the day why they have to pay the \$500 or whatever. If I thought things would get very heated, I would reserve the judgment and send it in writing the following day.

Mr Hemming:

I am of quite clearly of the view that it would be folly to merely say, "claim upheld- respondent pay \$500 to claimant" because that really makes a mockery of what it's all about and because you have encouraged the parties to feel relaxed to the extent that they can tell you their problems and even in the hearing you have paid scant attention to the law relating to, say hearsay, because you want to get to the bottom of the matter. It is in fact unfair to the parties at the time of decision to just cut them off. So, I am at pains to say to them well, my view about this matter is as follows. I will then summarise the evidence and the best I can explain to them why I am finding for one party rather than the other.

Most reasons for decision are presented to the parties immediately; however both Mr Hill and Hemming indicated that they took the matter under advertisement approximately 5-6% of the time.

3.19 Appeals and rehearings

A majority of the Magistrates were of the opinion that most people were aware of the limitations on appeals. Rehearings were not generally considered to be a problem, though a few Magistrates stated that the Court should they become a problem the Court should be given the power to prevent abuses and order additional costs.

3.20 Referees: Qualifications and training

The vast majority of Small Claims cases have been heard by Mr Hill and his successor Mr Hemming. The comments here are limited to their background, but generally the Magistrates all possessed legal qualifications and a legal background. Few if any had training in conciliation/mediation techniques necessary for a more inquisitorial style of hearing..

Mr Hill:

Immediately prior to my appointment as Commissioner in August of 85, I had been head of the legislation and policy

division of the Law Department for about 18 months and I had a fair bit to do with the drafting of the original legislation to establish a Small Claims Court in Tasmania. Prior to that, up to the end of 1983, I had been in private practice so I had that background and a lot of the areas of Small Claims - contract disputes, motor vehicle accidents - were bread and butter material for me when I was practicing law. That was generally my background.

Mr Hemming, prior to becoming a Small Claims Magistrate, was for a number of years, a crown prosecutor..

Mr Hill described the training he received for his new role:

A I had the opportunity to go to the mainland for a week to observe the Small Claims systems in Victoria and NSW. In NSW it is the Consumer Claims Tribunal in action and actually sat in with the Commissioner for a couple of days. I also had a day sitting in on the Victorian Small Claims Tribunal which is closer to the Tasmanian model. There they have to make an order according to the law, as opposed to NSW where it is based on principles of fairness, natural justice and "referees" do not have to have legal training. NSW is more like the NZ model. At the end of that week I attended a meeting of the Victorian referees. They met regularly to discuss their cases, the orders made, and techniques used. It was really interesting. In contrast, NSW was like we are sitting now (desk and two chairs in a room). It is a little more formalised in the sense that it's not an office but a separate room with parties sitting around the table. In Victoria the Commissioner was more apart and there was also a security guard, I suppose because of the higher number of ethnic litigants who can tend to get more volatile. That was the only training I had apart from my background which was mostly criminal. I certainly had no experience or background with mediation.

Mr Hemming, because of the time-demands of the position, did not have the opportunity to visit other states or to attend conferences with his Small Claims

counterparts in other jurisdictions. However, he did believe that extra-training, beyond legal qualifications, would be beneficial:

I think clearly, the job of a Small Claims arbitrator, conciliator, commissioner, Magistrate, call them what you will, requires legal qualifications. There can be no doubt about that because you have to make decisions that involve the interpretation of contracts and tortious liability. . . I guess it would have also helped to have worked in the civil area but I don't think it is essential because I certainly didn't. In terms of the other function, the dispute settling function, I myself, would think the decision could benefit quite clearly from exposure to whatever courses, whatever was available to the person in the position in the area of psychology or social psychology, or something, along those lines. I mean, there can be no training, you can't train someone to be an arbitrator- 99% of it is commonsense. I do think you can expose that person to the sorts of competing pressures that he is likely to meet in the people he is dealing with and you won't get that sort of training in a formal legal situation. It is the same situation that a general practitioner, legal practitioner, a GP has to have the same sort of thing, you can only learn on the job when you deal with clients. You can take the attitude that your clients are your bread and butter and your money. That's all they are. Or, you can take the attitude that you want to understand at least what they are talking about and to do that you have to have a bit of understanding of human nature. Some training could be useful, I would have thought, whereby we could be exposed to whatever was on offer in terms of understanding human nature a bit better.

3.21 Commissioner burn-out

Both of the full-time Magistrates and several of the part-time ones spoke of the exhausting nature of the position.

Mike Hill

I found the job, quite frankly, the most exhausting experience I have had - that's counting criminal appeals or any jurisdiction I have been involved with. At the end of the day in Small Claims I was absolutely exhausted.

3.22 Need for additional Magistrates in Small Claims

The Magistrates generally agreed that part-time Small Claims Magistrates were needed, especially for the north of the state, especially to save the one full-time Magistrate from having to travel.

Mike Hill:

It was always valuable to talk with my counterparts in other states. In Victoria and NSW they use part-time referees and it seems to me that if you had a person occupied a day a week to wander around the North (doesn't matter if Burnie, Devonport or Launceston). You can do about 6-8 of these cases a day, - at least the simple ones. This would prevent a backlog from building up and if you have some forward planning about estimated hearing times you can keep time loss at a minimum. Your full time person would thus only come up on a needs basis and you could keep the backlog under control. But the recommendation was never acceptable, whether because of the cost, (worked out some costs and it was insignificant) but it never worked out and the Magistrates were seen as the backstops to the Commissioner. That didn't prove to be effective in my view. The Magistrates took it on themselves to say we will only do motor vehicle cases which while they are the greatest part of the volume, are the easiest in my opinion. They usually take up to an hour at most, usually only a half an hour and you can turn them over at 6-8 a day. So Magistrates came in on a limited basis. I still can't understand why they don't have a person in the North. Q. What is the corresponding wait in the Court of Requests?

3.23 Research assistance

Both Mr Hill and Mr Hemming favoured the use of law students, on a voluntary basis, who could assist the Magistrate in legal research, helping to keep legal materials up to date, and factual investigation.

3.24 Delays

Again, Mr Hill:

People don't want to wait 6 months for a 500\$ dispute. And a lot of people, I am told by the Registrar, when they find it is going to take that long to get a hearing, just walk away. I don't know what it is now, but when I was doing it, the waiting period was 10-12 weeks and that's unforgiveable. If you have that sort of delay in that area it defeats the purpose of the legislation. Especially in the North,

3.25 Training of Court Staff

A number of Magistrates stated there was a need for more training of all staff. The nature of the training required related to greater knowledge of small claim procedures, how to assist people better, etc.

3.26 Execution of orders/enforcement

Michael Hill didn't believe it to be a problem, especially since it is basically the same as for the Court of Requests.

3.27 Resources

Both Mr Hemming and M. Hill mentioned system was under-resourced. Not only was a part-time Magistrate needed, especially to service the Northern part of the state, but also conducting conferences/mediation was a full time job which could not adequately be handled by someone with many other duties to perform.

3.28 Computerisation

Most Magistrates also saw the need for better record keeping and the need for computerisation of Court records. Also needed was the computerisation of existing procedures such as notices of hearings, etc. to enable the Court to achieve more efficient case flow management.

4. Court Personnel

4.1 Introduction

Interviews were conducted with Mr Peter Maloney, Policy and Research Division of the Justice Department and Mr David England, Administrator of Courts, and as such responsible for the Statewide operation of the Court of requests of which Small Claims is part. In addition, the Registrars and deputy Registrars from Hobart, Burnie, Launceston and Devonport were interviewed, as well as many support staff. These included: Philip Rickwood, Russell Viney, Walter Worsey, Paul Huxtable, Barry Hamilton, Ted McColloch, Bill Leary, Kevin Pinkard, Mike Collins, Janet Turner and Marie Whitfield.

4.2 Purpose of Small Claims Court

In general all the interviewees saw Small Claims Courts as providing a , inexpensive, quick and informal means to resolve minor disputes. For example, the major purpose of Small Claims Courts, according to Mr Maloney and Mr England, is to provide 'cheap and speedy resolution of disputes' The theme of access to justice was further elaborated upon by Russell Viney, District Registrar of Small Claims, Burnie:

I think of the real advantages is that it give people easier access to the Court, quicker access rather than the sometimes cumbersome procedures through the Court of Requests. We are able to give people a certain amount of advice with their small claims, whereas we are very limited with what we can tell them, the documents we an assist them with in the Court of Requests. Very very seldom, would anyone in the Court of Requests file their own claim and summons, for instance. I think the real purpose of Small Claims is to give people easy access. When they know that the hearing is only going to be between the parties involved, no solicitors around, it seem to

give them a little confidence, they know they are there on equal terms.

4.3 Public awareness of Small Claims

Mr Hamilton felt that the existence of Small Claims Court was well publicised when first established. Mr England felt people were generally aware of Small Claims now that it had become accepted as part of the system. The other Court officials echoed the same impression. When asked how people found out about Small Claims, the response 'by word of mouth' and by referrals from such groups as insurance companies, legal aid and consumer affairs. Mr Hamilton also noted that "Small Claims" was advertised in the phone book under department headings and that a notice board was occasionally put up in various seminars and conferences. He stated that Small Claims was also well known amongst legal practitioners, Consumer Affairs, and the people who work in the Court structure generally. Mr Maloney felt there needed to be more publicity about Small Claims and that this could be readily done by such things as large posters located at post offices, Local Council buildings and other areas frequented by large groups of people

4.4 Knowledge of small claim procedures

Court administrators and staff also felt that people actually using the system were adequately informed about the rules and procedures of the Court. An information booklet is given to all disputants. This booklet has been recently revised and the Court is continually trying to improve this aspect of the system.

4.5 Jurisdiction

The vast majority of those interviewed considered that the Small Claims jurisdiction amount possibly needed to be increased, but were also mindful that one would also have to consider a proportionate increase in the jurisdiction of the Court of requests. One would also have to take into account the fact that Small Claims, given existing resources, was already functioning at maximum capacity.

The interviewees saw no reason for changing the types of claims heard by the Small Claims Court. Mr England did note that the government was considering the possibility of a separate tribunal, similar to other states, for hearing landlord/tenant claims. Mr Maloney mentioned that if Small Claims took on this additional

jurisdiction it may then be possible to have a Magistrate in both the Northern and Southern halves of the state. Mr Maloney also noted that legislation was being proposed to also expand the jurisdiction of Small Claims to include boundary disputes generally and to remove crown immunity.

4.6 Filing and Rejection of Claims

Mr Hamilton noted that, with his departure, a new system was introduced by which only one clerk handled all Small Claims enquiries with backup from the other staff.

Rejection of claims not suitable to Small Claims is usually done by the Registrar or deputy Registrar in consultation with the Magistrate. Mr Hamilton noted that approximately one in ten claims appeared outside the Court's jurisdiction. However, some of these were later accepted when further questioning revealed that the fault lay in an incorrectly completed claim form. Also, if a disputant had received advice from a solicitor that the matter was within the jurisdiction of Small Claims, the claim form was accepted with the admonition that the Magistrate may find otherwise. The major reason for rejecting claims is that there is no dispute, but only an attempt to collect on a liquidated amount. Most agreed that a record of rejected claims would be useful, if for no other purpose than gaining some evidence about public awareness of Small Claims procedures.

No registry is kept, in any region, of the number of claims rejected or reasons for rejection. It was observed that rejection of claims was not a common occurrence and was becoming less so as the public was becoming more educated about Small Claims.

4.7 Insurance companies

Mr England felt that if there was a problem with any particular group of users of the Small Claims Court it was with insurance companies. More specifically, he indicated that some insurance companies seemed to be forcing their clients and the opposing disputant into the Small Claims. Registrars in the North and Northwest confirmed Mr England's statements and reported hearing some complaints about: 1) 'bullying' of insureds by insurance companies who force their insured through the system; and 2) the perceived unfairness toward an unrepresented disputant who must appear against a disputant represented by an experienced insurance agent. At the same time, there was the belief that the Magistrate kept proceedings, in such circumstances from becoming too overbearing against the unrepresented disputant.

Mr Huxtable noted that a meeting has recently been held between Court staff, consumer affairs and insurance representatives to discuss any problems involved with Small Claims.

Mr Hamilton didn't see insurance companies as a significant problem, though he did think that Magistrates needed to resolve the question of whether an insurance company was a party in interest. He also noted:

I must add, now the insurer is well aware of that problem and all they do is inform the client that they may not be able to conduct the case. We issue the notices and there were a few ' in the initial stages, but they have got to the point that they [insurance companies] know that their input will depend upon the Magistrate and how he defines the Act, ie whether they are an interested party.

Mr Maloney would like to see more research on issues involving insurance companies. He felt there could be evidence of a case for a separate insurance tribunal to which the insurance industry contributed, which would then free Small Claims to handle other claims. He was also wondered whether a significant number of cases involved insurance companies using the system as a debt-collection type service. If this were so they should be using the default procedures available in the Court of Requests rather than "dragging" the insureds through Small Claims. He also stressed that it was the claimant's case and that an insurance representative should not be monopolising Small Claims proceedings.

4.8 Debt collections

Another problem with claims involved potential disputants who want to lodge a claim for the collection of a dispute. Two Registrars noted that a number of business people have become upset when they discover that the mere collection of an unpaid debt does not fall within the definition of small claim and that the system was specifically designed to prevent the Court adjudicating such matters. Also note the comments above of Mr Maloney in regard to insurance cases.

4.9 Assistance by Court staff

A number of Court officials pointed out that they were bound by the Tasmanian legislation to give assistance to Small Claims disputants. However, one official noted the dangerous divide between giving assistance and giving unauthorised legal advice.

4.10 Staff training

Mr England pointed out that, historically the Small Claims division was established at a minimum level of resourcing. No specialised training of any kind was given. The major form of training is on the job: senior employees training younger ones. However, he does see the need for more specialised training, especially for people like Deputy Registrar who will be conducting conferences. All of the Registrars, who have responsibility under the new legislation (1989) to conduct pre-hearing conferences stated that they felt the need for additional training in this area. Mr Huxtable and Mr Hamilton also suggested the need for more training for the counter staff in how to deal with the public as well as more information about the Small Claims legislation itself.

4.11 Lawyers and Small Claims

Mr England observed that many local lawyers were at first opposed to the Small Claims. However, he opined that they now realise that it is not a threat to their existence and many advise their clients in respect to Small Claims and are generally supportive of the system. District Registrars and other Court staff also felt that legal practitioners were supportive of Small Claims and often advised their clients to take advantage of the procedure. Mr Maloney also noted that the statutory fees for lawyers appearing in the Court of Requests were so low that clients were often asked to make up the difference. Accordingly there was a considerable monetary incentive for disputants and lawyers alike to consider Small Claims as an alternative.

4.12 Preparation of disputants

All those interviewed stated that disputants were, for the most part, well prepared and aware that they could have witnesses and that there was no right of appeal. Mr Rickwood, felt that one exception to this general view was building claims:

We found often, particularly with what we might call building claims, people just don't come along prepared and frequently

have to have their hearing adjourned so that they can get the documents they need.

Although there was general agreement that people were well informed, all those interviewed felt that the system could be improved by an instructional video which explained and illustrated the procedures involved in Small Claims.

4.13 Registrars' conferences

At the time of interviewing such conferences were only being utilised in Hobart. The North and NW regions stated that they saw the need to use such conferences more often, but felt there was a need for more training in the conciliation/mediation skills. Paul Huxtable, also felt that the greater use of such conferences would eventually help with the delay problem.

4.14 Physical facilities

Court officials were generally satisfied with the physical facilities for Small Claims. Among the most needed improvements suggested were separate waiting rooms for Small Claims disputants. They should not be forced to mingle with the 'criminal' elements of society when lock-up day and Small Claims hearings are heard at the same time. Furthermore, Mr Huxtable suggested separate waiting rooms for claimants and respondents because of the hostile atmosphere created when parties are forced to confront each other prior to meeting with the Magistrate. The other improvement most often suggested was better signposting so that small claim disputants know where they have to go.

4.15 Night/Saturday sittings

Mr England and some of the Registrars indicated that from the point of the litigant the Court should consider the possibility of night or Saturday sittings, but from an administrative view it was impractical. The budget simply would not allow for it, given the need for penalty rates, security, support staff etc. He noted night Courts had not been successful in petty sessions. People don't like going out at night time, especially if they are the respondent and nothing good is likely to come out of the hearing.

4.16 Rehearings

The Court staff felt that the necessity for rehearings was not a major problem and was not subject to general abuse. Mr Viney noted that 90% or more of the cases were resolved after one hearing. Mr Huxtable suggested the introduction of a lodgment fee so that a party asking for a rehearing had to file an additional fee. This second fee would help the Court recover costs and discourage the frivolous filing of applications for rehearing.

4.17 Enforcement

Opinions on the issue of enforcement vary. Some staff stated that they didn't believe there was any significant problem in this area. For example, Mr Huxtable noted that enforcement would only be sought in approximately 4% of cases. This contrasts with approximately 60% in the Court of Requests. Mr Huxtable felt that it was because people had to appear in person which made the big difference. In the Court of Requests, lawyers conduct the action and disputants do not expect to have to do anything until enforcement proceedings are instituted against them.

Others acknowledged there had been some complaints and that there was no information about what percentage of cases had utilised enforcement procedures and how effective such procedures were. Mr Hamilton observed that disputants were now more aware of enforcement problems. The brochure received by all disputants points out that getting a favourable decision and enforcing the Court order are two distinct matters. Further information is given at the time of judgment.

' . . [F]irstly we explain the types of enforcements they have which are really the garnishees and warrants. We won't make a decision as to what should be done. We leave that to them. they have to take responsibility for their own decisions. We tell them the good, bad and the ugly of the enforcement up front now. We don't try to say, well, look we'll ring you when you've got your money . . . (Mr Hamilton).

4.18 Administration

Mr England and almost all those interviewed acknowledged the need for better and more complete records regarding Small Claims. For example, at the time of interview, there was no record of personnel costs specifically related to Small Claims. This is in large part due to the fact that the Small Claims is a division of the Court of requests. However, plans are being made to significantly computerise the system so that more information is available. Just to take one example from Mr Hamilton:

Yes, computerisation would be most helpful because we get a lot of letters coming in of the type, "how's my action going against such and such against Joe Blogs" . . . You look up Joe Bloggs' file and you can't find it because they didn't sue Joe Bloggs. . . .the computer information on the data bases would access that information much more quickly for you. It's very intensive dealing with correspondence because most people are not trained to draw out the relevant facts to identify files. You are always going on a small excursion before you can enter into the correspondence so a computer would help there.

Each region keeps records of files and knows at any point in time how many cases have been filed and disposed of. The north and northwest regions utilise a card filing system which contains the names of the parties and whether the matter is a contract, motor vehicle or other type of dispute. However, this system is not utilised in Hobart. As Mr England noted:

We haven't put in place, but we should do, a general reporting system so that each month or three months we can automatically get a list from each area to be collated as to how many cases have been lodged and dealt with.

Generally, the Small Claims system has been under resourced. The general impression is that staff are doing an heroic job under difficult circumstances. One by-product of the lack of resources is that insufficient time exists to coordinate policy Statewide. For example, interviews with the Burnie district Registrar revealed that it was Court policy, before initiating more expensive execution orders, to send a letter from the Court to the judgment debtor, demanding payment and threatening to take more formal execution procedures if necessary. This system apparently resulted in a very high compliance rate and represented a considerable cost/time savings for the

parties and the Court. However, no such policy was followed in the Hobart registry until recently when the interviewer pointed it out to Mr England.

Mr England and Mr Maloney acknowledged the need for and desirability of common policies. Unfortunately, at the time of interview, it had been years since there was such a Statewide meeting. Happily, a meeting was being planned in the near future. There was also a general perception that more statistical information was needed regarding the operation of Small Claims.

4.19 The need for evaluation

Related to the need for better information, Mr England and Mr Maloney also cited the need for systematic evaluations of the Small Claims Court to measure the extent to which the system was working to achieve its goals. The desirability of a regular and systematic evaluation of the system was also supported by Mr Hamilton, Mr Huxtable, Mr Rickwood and Mr Viney. Mr Viney further cautioned about the need for statistical measures needed to be simple enough so that they would actually help improve the system rather than imposing a further burden on an already overworked system.

4.20 Delay

Mr England and Mr Maloney saw delay as a serious problem and symptomatic of how overtaxed were the Court's resources. At the time of interview, delays between the date of filing and hearing in Hobart were averaging almost six months, though the problem was less acute in the other regions of the state.

Ideally, according to Mr England, the delay should be no longer than six to eight weeks. The delay problem appeared to be most severe in Hobart and least severe in Burnie.

Delay was seen as costly, not only to litigants but to the system of justice as well. As Mr Hamilton noted:

It's bad to have delays in Small Claims. It cause a lot of problems; it creates a lot of extra work. People start ringing up, enquiring, wanting to know why there are delays. They start booking holidays and things like that. It really is essential

to get the claim heard quickly. . . I would like to see us get to the stage that if the claim's filed, the notices get sent out to the defendant at the end of 2 weeks. At the moment a notice of the hearing is not sent out for anything up to 6,7 or 8 weeks later.

4.21 Assistance to Magistrate

The Court delay itself suggests that the Magistrate is working under a heavy load of cases. Mr England agreed with the interviewer, that law students could provide some useful research assistance to the Court. This was a reform which was adopted readily and should be useful, especially since an increasing number of cases are being taken under advisement.

4.22 Relationship to Court of Requests

Mr England noted that since the Small Claims Court has been in existence the number of cases being heard in the Court of requests has fallen. This observation was also confirmed by the Registrars in each region of the state.

Either party has a right to have a case transferred to Small Claims, which case was, originally filed in the Court of requests, but was within the Small Claims jurisdiction. Mr Hamilton indicated that approximately one third (1/3) of all cases heard in Small Claims are transferred from the Court of requests. He also said he had received letters from approximately five parties or their solicitors that a procedure should exist to transfer a case back to the Court of requests if deemed fair and necessary by the Magistrate.

4.23 Characteristics of Small Claims Magistrate/Part-time Magistrates

Mr Maloney highlighted the crucial role of having a Magistrate who is by training, personality and conviction supportive of the underlying philosophy of Small Claims. Whether a Small Claims system will be judged a success or failure will depend upon this aspect more than any other. In Mr Maloney's view, in this regard, Tasmania was very fortunate to acquire the services of Mr Hill, as the first Commissioner, and Mr Hemming as his successor..

Several of those interviewed, however, commented that part time Small Claims Magistrates 'on loan' from the Court of Requests generally did not enjoy their Small

Claims experience and found it very difficult to adjust to the informal, pro se and more inquisitorial setting of small claims. For example, some Magistrates taped the proceedings, sat a considerable distance from the parties, and placed their secretaries (with tape recorder) between the bench and the parties. It was felt that such a formal atmosphere was not consistent with the underlying philosophy of the legislation. Thus a considerable attitudinal/structural barrier to utilising Court of Requests to assist with small claims. As a postscript, just recently, the Court of Requests Magistrates have ended the practice of sitting occasionally in Small Claims. While this solves the incompatibility problem, the large case load burden of Small Claims remains.

For this reason, most thought it desirable to have a part-time Small Claims Magistrate in the Northern part of the state. This would mean that Mr Hemming would not have to waste valuable time travelling to the North and NW and would be free to address the delay problem in Hobart. Mr Maloney, however, pointed to the resource problem, ie there are no additional funds. However, he suggested there may be some possibility of assistance should Small Claims expand its jurisdiction to handle landlord/tenant cases under proposed legislation.

4.24 Overall satisfaction

Without exception, all those interviewed felt that the Small Claims system was working exceptionally well and had been a major success. One aspect of that success is the Court's efficiency. Mr Hamilton observed:

What you have to remember is that Small Claims is absorbed into a structure that was already there and it came at no cost to the community except for the cost of the Commissioner.

A number of interviewees also pointed out that the very few complaints and the fact that only one appeal writ had ever been taken to the supreme Court was also evidence that the vast majority of people were satisfied with the system. Finally, Mr Hamilton stated that while the system was generally operating well, it was important to now focus on the user's of the system to make it more accessible:

The only thing I suppose that we didn't do, we really didn't look at user needs. We are addressing that now and that is one reason why I put the map on the documents so that people can get here. We have also put a bit more information in the room,

sign writing on the doors is yet to come and a redraft of the pamphlet. To try to get users to understand it easier and to see that it's a bit more accessible.

4.25 Right of Appeal

Mr Maloney was concerned about a number of complaints the Department had received related to the effective absence of any right of appeal from a Small Claims judgment. At the same time, he acknowledged the difficulty of devising a structure which would provide such a right. This difficulty stemmed largely from the fact that no pleadings are involved in Small Claims and no record of evidence is maintained. Accordingly, any appeal would have to be de novo which would substantially add to the delay, formality and cost of Small Claims thereby defeating its major purpose.

5. Supporting Groups: Consumer Affairs

5.1 Introduction

Consumer Affairs is the the one group which has the most significant and regular contact with Small Claims Court. A significant number of consumers and traders often attempt to resolve their differences through the office of consumer affairs. If that avenue proves unsuccessful, then it is common for disputants to be referred to the Small Claims Court. It is important to stress that the relationship between consumer affairs and Small Claims is symbiotic. The existence of an official and formal dispute resolution process in the form of a Small Claims Court works hand-in-hand with the less formal processes of dispute resolution available through consumer affairs. At the same time, consumer affairs plays a major educational role in informing people about the Small Claims Court and assisting them in the preparation of their case. Finally, consumer affairs experts are often called upon by the Court to render an expert's report (for example in relation to faulty motor vehicle repairs, building disputes, etc) to aid the Court in its fact finding role.

The methodology employed was threefold: an intensive in-depth interview was conducted with Mr Don Heywood ', the staff member who has had the most contact with Small Claims. The interview was taped and a transcript forwarded to Mr

Heywood ' for correction and further comment.. Following that interview, the researcher conducted several impromptu informal interviews with other staff members. Finally, the researcher conducted a group interview with three consumer affairs staff members. The interaction amongst the group resulted in some most insightful comments. The interview was taped and detailed notes circulated to each member of the group for correction and further comment.

Finally, informal interviews were also held with State Director Michele Mason and then acting director, Mr Roy Olmyrod.

Below are the major points raised in the group discussion.

5.2 Background of the participants

Each of the participants was asked to state their background and experience with Small Claims

JIM CUMMINS (JC)(approximately 12 times before Small Claims Court. Twice to present an expert's report.; most often to appear as a witness. On the odd occasion he has acted in a representative capacity to present a consumer's case)

PHIL MARRIOTT (PM)(approx 1-2 times a month before the Court). Works with traders and consumers. Specialises in automobile complaints (mechanical/motor vehicle problems).

IAN STEWART (IS) (not as involved with Small Claims as PM) Dealt with insurance claims (not motor vehicle).(about six appearances before Court.

MICHELE MASON (brief discussion afterwards)

5.3 Purpose/overall Impression of Small Claims

The overall comments stressed the interrelationship between Small Claims and consumer affairs.

JC: Found "Small Claims an excellent vehicle for deciding a case that we (Consumer Affairs) can't decide, especially one where trader and consumer can't come to an agreement."

PM: Many cases involve conflict of statements (even on statutory declarations) . The Court has to sort out who is telling the truth. Also need Legal background to decide balance of evidence in cases where there are errors on both sides.

5.4 Public knowledge about Small Claims

All agreed that the availability of Small Claims and information about its rules and procedures needed to be publicised more. Many people forego their claim and the dispute goes unresolved merely because they do not know of the existence of Small Claims.

At the same time, knowledge of Small Claims is increasing as more and more people have been through the system and agencies such as Consumer Affairs bring it to consumers' attention. People often ring with a complaint which can't be investigated by Consumer Affairs because there is no Consumer/trader relationship. Nevertheless they are told about Small Claims and how it works. Thus, Consumer Affairs helps "sell the system".

The group made a number of suggestions for improving awareness of Small Claims: :
1) Radio/Tv, 2) appointment of an extra Magistrate, which would mean more time available for publicity, 3) contact community groups/social/underprivileged organisations.

5.5 Filing Fee of \$20

PM: feels that pensioners and others should be able to sue for 50-80\$ and get their filing fee back. Need to keep it low.

IS: stated at least one Magistrate has made it clear he will not grant costs (allow the claimant to recover the filing fee) unless hardship is shown.

One suggestion is to base the filing fee on the amount involved.

5.6 Jurisdictional Limit/types of cases

All agreed need to extend the limit to \$5000 as has been done in Victoria and the Northern Territory. Motor vehicle damages, especially, can quickly amount to over \$2000.

As to types of cases heard, there was no recommendation for change.

5.7 Traders' Response to Small Claims

PM "Some of the 'bad' traders have now lost quite a few cases. Thus the mere "threat" of Small Claims is now working to make these types of traders more amenable. In fact, standard letters now often indicate Small Claims as part of the natural chain of progression in this type of case. However, it should be stressed that resolving, working out the problem, by means of settlement is the preferred option.. "Many traders now bring Small Claims actions themselves because they consider it a reasonable and fair system".

IS: The presence of Small Claims makes even the good traders more amenable to settlement. A common reaction is 'why should I waste my time and staff time going to Court.?' Thus they compromise and are done with it.

JC: Some traders are very irate that they are taken to Small Claims. One was so incensed he wrote a letter to the Court saying he had wasted so much time and money, he fully expected to win the case and wouldn't show up. He obviously lost. Some traders believe the consumer has no right to go to Small Claims, yet they don't try very hard to resolve the matter.

5.8 Settlement:

All group participants were of the opinion that the full-time Magistrate, Mr Hemming, was very effective at using the preamble, before hearing, to put pressure on the parties to settle. A major factor in this success is that, unlike Consumer Affairs, he has power of the Court to impose and enforce a decision.

5.9 Abuse of the System

Some traders circumvent the restriction against using the Small Claims Court as debt collection by manipulating it to look like a dispute format and institute it as a dispute and collect.

Similarly, insurance companies take a punt and gamble (20\$) and use the Court.

JC thinks Insurance body has appointed some types of ombudsman. Small Claims now have separate form for motor vehicle accidents. PM: thinks insurance companies have assumed the attitude that "if we have to pay, we pay, but for 20\$ it's worth the risk of contesting it and maybe not having to pay.". "This is one of the failings of the system".

5.10 Absence of Lawyers

All considered it important that lawyers remain excluded from the system.. There is no need for a lawyer if everyone is on the same footing, though it was acknowledged that some traders/insurance company agents have become very skilled and perhaps have an undue advantage. This problem requires careful monitoring by the Magistrate to make sure the stronger party does not take advantage of the situation.

PM: noted that the Magistrate will adjourn case to allow ill-prepared party to come back at a later date. Also, having two sides well prepared (eg expert witnesses on both sides) helps the Magistrate decide.

5.11 Preparation of Parties

All felt that the brochure handed out was inadequate. Parties do not appreciate the importance of witnesses, and of detailed statutory declarations. Also, they don't realise that in dealing with a trader they are often suing a person not a business name. Many consumers do not realise, they need to go to corporate affairs and find out the persons who own the business.

The system could be improved by the establishment of a counter where people can go and get help. The group also agreed that an instructional video would be an excellent idea, as well as better brochures.

5.12 Saturday/evening Sessions

JC: "Good idea as far as the consumer is concerned".

At the same time need to consider that you are paying double time plus cost of buildings, security etc.. The group felt that the system would get better value for money by appointing a second full time Magistrate..

5.13 Degree of Formality

All agreed that the level of formality generally achieved the right balance to conduct an orderly hearing, yet enable people to feel comfortable in presenting their own case. JC thought it was a little too formal in that sometimes the litigants do not understand the decision, especially when it is given on technical grounds. (eg of case involving principle of mistake; party lost on technical ground and did not have any idea why they lost. Thus they felt badly done by).

A suggestion was made that the Registrar do post-counselling session or make it known on the form that if there is anything disputants do not understand, they should phone the Registrar.

At the same time, it was recognised that there was a need for some formality to indicate to parties that it was a serious matter and that they should act with the proper decorum. There was also a security risk to Magistrates if it were too informal and parties would be tempted to be too aggressive to each other.

5.14 Reason for decisions

Magistrate generally gave reasons for decisions. Indeed, Magistrate Hemming prepares a 4-5 pg carefully reasoned decision which is given to the parties.

5.15 Migrants

Generally, they fared well though IS told of one example of a new Australian who needed more time to give his answers and the Magistrate was very impatient and made decision without the new Australian having the full opportunity to present his case. However, it was felt that this was certainly the exception.

5.16 Physical facilities

'Waiting room facilities at Executive Building are terrible' Parties are in too close proximity and it adds to the tension. The waiting room at the Murray Street Court (next to Library) is noisy if children are there. Also, a disputant with a loud voice speaking in the hearing room can be heard by witnesses and other disputants in the waiting room.

When asked about the provision of child care facilities, the group felt it was not necessary.

People don't expect it at a dentist and related services. Parties have plenty of lead time to sort something out and the cases don't last that long

5.17 Delays

All definitely agreed that another Magistrate was needed.

Delay is a real problem. in a lot of cases, the parties just can't hang on that long". "eg of a car which was allegedly faultily repaired". She just had to make arrangements to get the car on the road.

The legislation should also be amended to provide a procedure to deal with emergencies. 'If the respondent knows you are in a hurry (eg are moving interstate) or can't afford to wait, they can use the delay in the system as an unfair advantage.'

JC told of an instance of three women who had identical cases against the same travel agent. All three cases were tried separately. The first claimant won; the second one, lost. First one appeared in person. Second one, had to move interstate and could only present a statutory declaration which unfortunately was not sufficiently detailed. Also, the longer the delay, the greater that likelihood evidence is destroyed, perceptions distorted, parties frustrated and so on.

5.18 Enforcement

This was also perceived as a problem. People do not realise that getting a judgment is only half the battle. Collecting on it is often frustrating and costly. Prospective litigants need to be made more aware of this problem by means of a brochure, video and other devices.

There was also a problem in enforcing a judgment against an interstate defendant. Again, litigants need to know of the difficulties ahead of time so that their expectations are realistic.

6. Supporting Groups: Community Legal Service

6.1 Introduction

Community Legal Service is another major organisation which informs disputants about Small Claims and often advises them to utilise Small Claims procedure.

An in-depth interview was conducted with Mr Reg Marron, vice president of the Hobart Community Legal Service and a private practitioner. The researcher also visited the Hobart Community Legal Service office where he visited with director Grazyna Smith, lawyer Mark Hale and Community worker Mrs Pat Perry.

6.2 Relationship between Small Claims and Community Legal Service

The Hobart Community Legal Service (CLS) offers evening advice sessions and daytime referrals. Mr Marron estimated that 25% of the cases were referred to Small Claims. Initially, clients were referred to private practitioners who often helped clients prepare for Small Claims.. Now the CLS will prepare a person's claim. They have the forms and have negotiated with the Registrar to provide this service. In Mr Marron's view: 'We see the the CLS role as interpreting the parameters of the Small Claims Act and being able to help the litigant to prepare their action.'

6.3 Purpose of Small Claims

Mr Marron responded;

It has provided an area of redress for areas which lawyers have increasingly been reluctant to deal with and where people can resolve their disputes through their own efforts. As people become more aware of its existence, I think it will see

continued growth as it is increasingly used to resolve these types of disputes .

6.4 Public awareness of Small Claims

Mr Marron had offered these comments and suggestion:

As far as community perception is concerned, before they use it, people see Small Claims as good, although there is a reluctance to initiate their use of it. This is because they don't understand the procedures involved.

Q Do you think enough people know Small Claims is available? Is it advertised enough?

Up until last week I would have said yes, but I'm learning that our own CLS is not as well known as I thought it was despite massive publicity. Though we have been up and running since '85, I think it can take almost almost a decade to really work through the system, so people know about it. But you also have to use every opportunity to publicise the availability of the service. It seems to me that Small Claims needs that publicity to encourage people to resolve their disputes. Other Courts don't need that, but we want to encourage people to know that the system can still offer them help despite the fact that the claim is small. The way this can be done is for organisations like Consumer Affairs, CLS and especially community group representatives need to be well aware of how Small Claims works. The Small Claims Registrar needs to be in touch with these organisations to educate them about the Court.

Q Does this happen ?

A Not at all. This is because the Registrar is so busy being kept flat chat with other duties in the Court of Requests and Small Claims that there is no time available. So it tends to work the other way around. We see the CLS as a conduit to

help educate people about Small Claims. The Law Handbook has been the biggest way of bringing that about.

6.5 Small Claims the private practitioner

Mr Marron was asked whether the private bar supported the concept of a Small Claims Court?

I think they see Small claims as important for clients they cannot help because either i) the party can't get legal aid; ii) can't afford to bring a case with a lawyer; or iii) it's a complicated legal area which would accrue more legal fees than the matter was worth. Small Claims is also made more attractive especially given the scale of fees available in the Court of Requests, which scale is wholly inadequate in view of the lawyer time required and the legal complexities involved. Small Claims is not viewed as a threat, but as providing a vehicle to resolve those disputes in circumstances where the lawyer's fees would be prohibitive. Some lawyers merely refer their clients to Small Claims. However, some, including me, have actually drafted submissions for the client going to Small Claims.

6.6 Jurisdiction

The general view was that the jurisdiction of Small Claims should be increased to \$5000. This would take inflation into account and bring Tasmania into line with other states.

6.7 Conference with the Registrar

Like the Magistrates above, Mr Marron highlighted the important role played by the Registrar's conference.

On a related point I think the conference with the Registrar is important in keeping litigants aware of the status of their dispute and giving them a way to settle, a way out to save face. I've had the opportunity of visiting the Victorian Small

claims Court. The emphasis there is that every stage of the dispute is aimed at resolution of the dispute. Even to the point that in the hearing room, the arbitrator will say to the parties "I'm leaving the room to give you a chance to discuss this for a few minutes because I think there is a good chance you can resolve it yourselves. I want to give you the final opportunity, before the axe falls to resolve things." It's surprising the number of people who do resolve things when given this opportunity.

6.8 Disputants' understanding of Small Claims procedure

In contrast to the Magistrates, Mr Maron thought that many disputants were unaware of Small Claims procedure:

As it stands now, on the day of the hearing people often do not have their evidence assembled, they haven't prepared properly, they have no ideas of the rules of evidence. Even though formal rules are suspended many litigants do not understand the basic rules which do exist. For example when the Commissioner says they can cross-examine, many think that means they present their own case. There needs to be a lot more education about the roles and procedures operating in the Court.

The whole process needs to be broken down into its various steps so people understand the situation and how to go about resolving it. For example, before a hearing people should realise that they must have exchanged proofs, exchanged aspects of quantum. Can they agree on quantum? In other words, the sort of things you normally consider on pre-trial? When people file their claim they should be able to make their own statement or simply be directed to answer a number of questions which would relate to important items. For example, what is the quantum? Is it supported by evidence? If not where is the evidence? If so, is it attached? When the reply comes in from the respondent, the claimant should have to answer, do you agree with the quantum? etc. This would

simplify things by making the parties participate more. The form itself could say that if you have any trouble with these matters you can call the Court. In fact I understand that under the Act registry staff are charged with assisting the litigants in preparing their claims.

The Court also needs to be "de-mystified". In fact I don't think it should be called a "Court". The word scares a lot of people off. "Arbitration is a better word. . People need to understand not only the role of the Court but the workings of the Court so that more will use it and use it more effectively.

I would like to see a sheet on the table in front of each party that sets out clearly the way the proceeding will be dealt with. eg "The Commissioner's name is Mr You're sitting here, the other party will be sitting here. The order of events is: The estimated time for the matter is " What often happens is that matters often move off the rails on some intractable matter. If the sheet were there the Magistrate could say "we're up to no 3 Mr Smith". People can't deal with the abstract and things need to be spelt out clearly. A checklist/agenda would be very helpful. People need to be aware of the expected time, not to put a stopwatch on them, but to focus their attention on important matters.

Unfortunately, my experience is that there are those who are also many are unhappy with the result of the Small claims case because they feel their evidence wasn't heard, or that they didn't get enough say, etc. Whenever you have a loser and a winner, this will always occur. However, people will be more supportive of the Court if they understand exactly how it works.

Without doubt this public education could be achieved by appropriate accompanying notes and perhaps a video which could be available. This is an area the CLS is looking at and I know that videos have been prepared by Legal Aid Commissions in other states and are freely available to

schools. In fact schools are encouraged to study this area of dispute resolution.

6.9 Staff training/Court resources/administration

Like the Magistrates, the CLS people stressed the importance of staff, specifically trained for Small Claims Court work. Mr Marron concluded:

I don't believe that this is always done. I don't believe that all the staff are well versed in Small Claims. In part this is because there is one common registry for the Court of Requests which includes Small Claims and the staff are so busy with other tasks that there is little time for or training in assisting people with small claims. In fact they are still doing all manual entries for data. Thus while I'm suggesting that these things happen, the streamlining of procedure, resources are scarce. At the same time something like the new tax pack incorporating questions and the form could significantly improve things. I know the special Commissioner will adjourn the matter if a key witness is not there etc. While this ensures justice, the need for this type of thing would be lessened if people were made more aware of the process as they went through the system. At the moment it seems terribly inefficient to have a situation where the defendant can not show several times before the claimant gets a decision. Why should the claimant be prejudiced if the respondent fails to show. If people know that their non-appearance will result in the case being heard without them then they will more likely accept that and make sure they show up or take the consequences. If respondents know the rules before hand their is less likely to be the perception that the Court doesn't work. It's an informed decision. There are latitudes in some areas which are disproportionate to others. If you are going to be so accommodating to the respondent, the Court must be equally so to the claimant in the area of filling out claims. At least a seminar is warranted for registry staff in how to better assist with small claims. That seminar could also involve

people from community groups and CLS. CLS could even chair it if the Registrar did not want to .

6.10 The employment in Small Claims of part-time Magistrates from the Court of Requests

Mr Marron made these comments:

There's also a problem with Court of Request Magistrates who occasionally help out on Small Claims. Most of them pre-date the Small Claims Act and have developed in their own mind how things should go. Also it is a very boring area for them and annoying because they are accustomed to dealing with lawyers who know the procedure and won't muck them about. The last people they want to see are Small Claims litigants who are bickering and fighting and often have hidden agendas between them. Very rough justice can result if parties do not get the message from the Commissioner that he has heard enough on this. It may be that we have the seminar mentioned above with Magistrates involved so that we can discuss public perceptions of the Court and how to best educate people so that the Court will achieve the purposes for which it was established. Magistrates need some feedback as to how things are going.

6.11 Insurance companies

Mr Marron:

Regarding insurance companies, I have been aware of insurance company's training their staff to act as advocates in insurance cases, usually motor vehicle cases. This can sometimes lead to an unbalanced situation in Court. I believe that this could be redressed if the Commissioner identified at the start that the person from the insurance company was and advocate and ensured that the other party was not unfairly prejudiced (ie assisting where possible). I am aware of a case where an insured was in the right. Her insurance company indemnified her for everything except her excess. However

the other party were not insured and they are suing her in Small Claims. The ins co is letting the action go through, telling her that if you lose we'll indemnify you. Where the ins co normally enjoys subrogated rights, here they are abrogating their rights saying "we step back from the agreement and we are telling you to step into the Small Claims". People expect their company to cover them and don't realise that the insurance co can buy out of the action and virtually force the litigant to go through Small Claims. So the practice of putting in staff advocates may be a policy they are gradually phasing out. You perhaps need to talk to them about that.

6.12 Debt collection services

Mr Marron:

I have heard that some debt collectors do try to use the Court to collect by stating there is a dispute. I know the former Registrar, Barry Hamilton, used to weed out those people by disallowing their claim. However, it is an easy loophole to get around. While there is a potential to abuse it, is up to the Registrar to redress the problem when he sees there is one.

6.13 Night time/Sat sittings?

Mr Marron:

Given the popularity of CLS evening hours it would have to be something very seriously considered, but overtime rates might kill such a proposal off. It would be especially good for people who have to take time off work. Bear in mind that a day off work could mean a few hundred dollars, a fact which could deter people from bringing their case to begin with. Also, you can't claim witness expenses, though many people mistakenly think you can. Again, people need to be aware of this.

6.14 Enforcement

Mr Marron thought that many disputants were uninformed about the enforcement aspects of Small Claims.

I think most people literally think the judge shakes the respondent, turns them upside down and the money falls out. Many have no concept whatsoever of recovery. This is especially so for clients with little education. I don't know what the actual figure is but the recovery rate on judgments has to be pretty low.

Q What about garnishment?

A Yes, it's good when available, but it has problems in the case of contractors, self-employed people etc. And of course you can appeal against an order on the grounds of creating undue hardship etc.

6.15 Disputant Satisfaction with Small Claims

Mr Marron expressed the belief that a significant number of disputants were in some way dissatisfied with their Small Claims experience, especially in regard to the delay in getting a hearing.

I believe that there would be 50 % of the people who felt they did not get satisfactory redress of their dispute. This is first because they had no concept of the delay (3-4 mo) to have it listed. I don't think that in all cases the registry staff makes this clear ie no estimate is given of how long a delay is likely. Even if a rough estimate is given, I think a clear warning needs to be made even to the point of typing that point in on the form given to litigants or bringing that to the attention of litigants when they file their claim. In many cases this will directly affect the outcome of the dispute, eg availability of witnesses, of evidence. People's willingness to proceed 3-4 mo down the track is a major factor.

7. Supporting Groups: Trade Practices Commission

During the year, the researcher was in regular contact with Mr Peter Clemes, Tasmanian Director of the Trade Practices Commission. Visiting Mr Clemes informally about the Small Claims Court, he indicated that the Commission has a policy of leaving purely state matters primarily to state bodies such as Consumer Affairs and Small Claims. It was his impression that the state Small Claims system is generally working well. However, he agreed that more publicity was necessary to make its services and procedures better known. He also favoured the use of a form of class action to enable a group of consumers, with a common complaint to proceed collectively rather than having to bring separate actions.

8. Supporting Groups: Legal Aid

The researcher interviewed lawyers who had handled cases as part of the private Legal Aid scheme in Tasmania in which the local legal profession participates as well as having informal discussions with Prof Don Chalmers and Ken Mackey who had undertaken a major report on Legal Aid in Tasmania.

In general terms, the Legal Aid people had little contact with Small Claims Court disputants. This was in large part due to the fact that the filing fee of \$20 was low enough that few people considered Legal Aid as a source of assistance regarding Small Claims. However, in common with many Small Claims disputants Legal Aid had to deal with problems of access such as lack of public awareness, psychological barriers and so on.

9. Supporting Groups: Dispute Resolution Centre

The researcher interviewed Ms Jill Sanders, who has been instrumental in establishing a Dispute Resolution Centre in Hobart. Further information was also obtained from Ms Sanders' Report on Research Into Mediation Centres submitted to the Law Foundation on June 1990. Because a Mediation Centre is not yet been operational, the focus of the interview was on the future relationship between the Mediation Centre and Small Claims.

9.1 Symbiotic relationship

It is important that the relationship between the Mediation Centre and Small Claims be seen as complementary. In this sense the word "alternative" dispute resolution is inappropriate. Rather, for several reasons, the desired relationship is best described as symbiotic. First, as Ms Sanders Report notes, the vast majority (at least 70%) of the case load handled by Mediation Centres in other States is from referrals. Accordingly, the success of the Hobart Mediation Centre will depend upon the establishment of a cooperative network whereby police, legal practitioners, Legal Aid, Court officials, and other local agencies refer appropriate cases to the Mediation Centre. Second, although there is some overlap, Mediation Centres have traditionally handled types of cases, many of which would not involve Small Claims, e.g., complaints about animals, smoke and pollution problems, children's behaviour. Accordingly, the two are not in "competition" with each other. Third, to the extent there is an overlap in jurisdiction between the Mediation Centre and Small Claims, the two vehicles for dispute resolution represent different points along the same continuum. Moreover, the mere existence of Small Claims acts to encourage parties to settle their differences voluntarily, by agreement, as opposed risking an involuntary Court imposed decision. In conclusion, it will be important that the new Mediation Centre establish a working relationship with Small Claims, as well as the other groups mentioned above. Indeed, the existence of such a Centre could significantly aid the Small Claims Court in better resolving disputes ill-suited to the more formal resolution inherent in the Small Claims Court procedure.

9.2 Training

Mediation Centres in other states have placed great emphasis on staff training. This entails an initial course (50-80 hours) of formal training followed up by periodic ongoing training and supervision after practices in "live" mediation. Indeed, Sydney program runs a 180 hour training program. Generally, the content of such programs

includes courses in self awareness, personal development, the nature and resolution of conflict, the mediation process, field work, exploration of ethical issues (e.g. injustice, power imbalance, confidentiality, inequality and oppression), cultural issues and other topics drawn from sociology, psychology, law, political science, administration and other disciplines.

Training of mediators has already commenced in Hobart. Given the important role of mediation and conciliation played by the Small Claims Court, similar training should be undertaken by key Court staff.

9.3 Intake

The Mediation Centre also stresses the important role played by the "intake worker" with whom a disputant has first contact. The intake worker has to be fully informed and adequately trained to assist those who seek to utilise the mediation facilities.

9.4 Cost effectiveness

Like Small Claims Court, a Mediation Centre would be cost effective. Not only would many disputes be resolved, but the preventative approach also would enable police, Court officials and others to do their job more effectively. Finally, it is argued that through the process of mediation parties are empowered and involved and as a result are more likely to comply with and be more satisfied with a voluntary agreement than a Court imposed decision.

9.5 Evaluation

Ms Sanders agreed on the importance of regular and systematic evaluation of the Mediation Centre. This would likely entail the ongoing collection of data, interviews with parties and those involved in the supporting network.

10. Conclusion

Below is a summary of the main points made by Magistrates, Court staff and Supporting Groups.

10.1 Magistrates

1. The majority of Magistrates felt that the Small Claims Court is succeeding as a vehicle for improving access to justice for the ordinary person by providing a dispute resolution procedure which is economical, quick and informal enough that disputants can handle matters themselves.
2. Most of the Magistrates felt that the jurisdiction of the Court should be extended beyond the \$2000 limit to take inflation into account. This would likely mean a proportionate increase in the jurisdiction of the Court of Requests.
3. There was virtually no support for extending the jurisdiction of the Small Claims Court to include causes of action not presently within the Court's jurisdiction.
4. A majority of Magistrates felt that the public was becoming increasingly aware and informed about Small Claims, but there were some strong expressions that more the Court must receive publicity. this was best done by the Magistrate or other Court officer speaking to key community groups.
5. Most Magistrates agreed that conciliation and arbitration techniques form a very important part of Small Claims. There was a consensus that the Registrar's conference could and should be used more often and that Small Claims staff, including, Magistrates should receive additional training in this area. There was also some concern about the apparent role conflict caused by the same Magistrate having to play the role of conciliator and adjudicator.
6. Informality and privacy were viewed as important to the Small Claims hearing. Part-time Magistrates, from the Court of Requests, however, felt uncomfortable with the informal procedure and absence of lawyers in small claims.
7. The perception of most Magistrates was the disputants are generally well prepared for their hearing; know they can call witnesses and are aware of the limitations on the right to appeal. At the same time, most Magistrates agreed that an instructional video would further assist people in understanding Court procedure and conducting their cases.
8. The Hobart Small Claims setting (Murray Street) was illustrative of the most desirable setting for Small Claims hearings. This included a smaller room, generally informal, the parties facing the bench which is slightly raised, white board for illustrations. However, problems of adequate waiting rooms, acoustics, parking, and

building access were highlighted by some Magistrates. The use of the judges chambers in Devonport and formal Courtrooms in Burnie and Launceston were considered by most, to be inadequate for Small Claims. There was little or no support for the provision of child care services.

10. There was some strong support for evening hearings, but little for Saturday hearings. However, the practicalities of cost, extra staff, and security raised questions about the feasibility of such hearing times.

11. Insurance companies and debt collectors were considered by most to be the major sources of possible abuse of the Small Claims system. However, most Magistrates felt that any problems were not especially serious and significant abuse was prevented by the Magistrate.

12. All Magistrates agreed that the Small Claims system was working well for different income groups and nationalities.

13. All Magistrates considered it important to, and did, give reasons for their decision, even though not required to do so by the Act.

14. There appears to be little problem with enforcement of orders from the Small Claims Court or with the rehearing procedure. Some abuse occurs, but only in a very small percentage of cases..

15. The demands placed on the Small Claims Magistrate were viewed as extremely taxing and exhausting. Most agreed with the need for the appointment of an additional Small Claims Magistrate, at least on a part-time basis, to service the northern part of the state.

16. Most Magistrates thought that the most crucial problem facing Small Claims is the delay between filing the claim and getting hearing. This problem appeared greatest in Hobart where the delay was 3-4 months. Ideally, most Magistrates felt the waiting period should be 5-6 weeks.

10.2 Court administration/staff

1. The Small Claims Court Registry and staff saw the role of the Small Claims Court in the same philosophical terms as did the Magistrates: the provision of an affordable, informal and speedy dispute resolution mechanism.
2. Also, like the Magistrates, the Court staff felt that the system was generally working well.
3. Most staff felt that people were becoming increasingly aware of the existence of the Small Claims Court.
4. Since the inception of the Small Claims Court and with the increasing number of disputants, the number of cases filed in the Court of Requests has fallen.
5. More training is required, both for staff who work on the counter and assist disputants, and for Registrars and other Court officers who handle conferences.
6. With the exception of the agreed need for an additional Small Claims Magistrate, Burnie and Devonport appear to be adequately resourced. Hobart staff are also carrying a very heavy load and Launceston is short of staff.
7. Staff concurred with the Magistrates that there is a delay problem which is most acute in Hobart and best under control in Burnie. The major factor in this respect is the time constraints on the availability of the Magistrate.
8. Staff felt that most litigants were prepared for their hearing, though the exception was noted for building disputes. All agreed that an instructional video would improve the quality of disputant preparation.
9. A majority agreed that some consideration should be given to evening sittings. However, few were in favour of Saturday sittings. All acknowledged the problems of cost, staffing, security, etc.
10. There was little support for the availability of child care, the point being made that the hearings were less than an hour long. In the North and NW there have been some complaints about the lack of a separate waiting room for Small Claims. In Hobart there have been complaints about the lack of a separate waiting room for Small Claims claimants and respondents. The physical setting of the Court was viewed as adequate with the specially designed Hobart Courtroom being the ideal.

11. All agreed that it was important that hearings be private and as informal as possible.

12. There have been some complaints about insurance companies over-utilising the system and 'bullying' insureds and the opposing party. However, the Magistrates have largely kept matters under control. Also, a meeting has been held between Court staff and insurance representatives to resolve any difficulties.

13. Some businesses have also attempted to utilise Small Claims to collect on a debt about which there is no dispute. There is a need to clarify the definition of 'small claim' under the Act and for more staff training in this regard.

14. Enforcement and rehearing procedures appear to be satisfactory.

15. There is a need for more statistical information and record keeping in regard to Small Claims. Computerisation of Court records and procedures should greatly improve things.

16. All staff supported the need for and desirability of systematic and regular evaluation of the Small Claims Court.

17. There is a need for more regular meetings and communication among the three major regions of the state. .

10.3 Supporting groups

No attempt will be made here to repeat the areas of agreement between supporting groups, Magistrates and Court staff. Rather, this summary will focus on additional matters raised by these groups and any perceived differences in opinion which they expressed.

1. Compared to Magistrates and Court staff, supporting groups were much more adamant regarding the need for greater publicity about the existence of the Small Claims Court and for more information to educate disputants about Small Claims procedure.

2. They were also more critical of the preparation and skill of disputants in handling their own disputes.
3. Supporting groups were especially conscious of the relationship between their organisation and Small Claims. Small claims was viewed as the final point in a continuum of dispute resolution attempts by more informal, and voluntary means.
4. A number of suggestions were offered to 'de-mystify and educate disputants about Small Claims. These included an instructional video, more efforts made to explain procedures, greater use of pre-hearing conferences, and more realistic expectations regarding enforcement.
5. Supporting groups appeared to view with greater seriousness the problems associated with insurance companies and debt collectors and the enforcement of Court orders.
6. Supporting groups appeared place greater emphasis on the disputant as consumer. They were less satisfied, than Magistrates and Court staff, with the convenience of Small Claims hearings. Waiting rooms, parking problems, acoustics, and the absence of child care were some of the problems highlighted. Most supporting groups were also much more likely to favour Saturday and evening sittings.
7. Perceived overall satisfaction with the Small Claims Court was high, but, as noted by the above comments, the system can be improved

Appendix F

Small Claims Court Observations: Physical Aspects

The descriptions and discussion contained in this section are the result of personal observations conducted at the Small Claims Courts located in Hobart, Burnie, Devonport and Launceston as well as interviews with Court staff and Magistrates.¹

Many physical aspects of Small Claims Courts in Tasmania were discussed in Chapter 6, sections 1 and 8. However, below is a more detailed description of the physical layout of Small Claims Courts in Tasmania as compiled from the researcher's field notes and interviews.

Southern Tasmania

Mr Hill² commented on the importance of disputant convenience in a Small Claims setting and gave his opinion of how Tasmanian facilities measure up:

Question. What about overall convenience? Access to the building, provision of child care services, etc.?

Answer. I think provision of child services would be great. I think the original premises at the bottom of the

¹ Other writers have conducted similar research. See e.g., 'The Small Claims Session'; Consumer Council, *Justice Out of Reach, A Case for Small Claims Courts* (1970) (London, Her Majesty's Stationery Office) (Consumer's plea for a Small Claims Court); C. A. McEwen, and R. Maiman, 'Mediation in Small Claims Court: Achieving Compliance Through Consent' (1984) 18 *Law and Society Review* 11-49 (comparing enforcement results with adjudicated as opposed to mediated cases); T. N. McFadgen, 'Dispute Resolution in the Small Claims Context: Adjudication, Arbitration, or Mediation?', unpublished LLM thesis, Harvard Law School, 1972 (observation of 15 sessions of Cambridge Mass Small Claims Court); B. A. Moulton, 'The Persecution and Intimidation of the Low-Income Litigant as Performed by the Small Claims Court in California' (1968-69) 21 *Stanford Law Review* 165-1684, at 1662-1669 (a revealing picture of low income defendant's plight against plaintiff debt collectors); W. M. O'Barr and J. M. Conley, 'Litigant Satisfaction versus Legal Adequacy in Small Claims Court Narratives' (1985) 19 *Law and Society Review* 661-701 (analysis of disputant testimony in Small Claims and the perceptions of disputants to the Small Claims process); Small Claims Study Group, *Little Injustices, Small Claims and the American Consumer* (1972) (Washington D.C., The Center for Auto Safety) at 182-195 (observations by researchers of number of Small Claims hearings).

² Personal Communication with Magistrate Hill, as noted above, See Summary of Interviews, s 3.

Executive Building where we had a private entrance were as good as we would get. I had a separate entrance and we had separate chambers. The litigants had an ample waiting room and it was a comfortable area. People seemed to have little trouble finding it.

I think what they have now is an absolute disaster -- People walking up stairs, going through restaurants, and so on and I just think that is totally unacceptable. I think the Court set up and waiting room is ok, but it's getting there and finding it which is not well thought out. That's one of the problems with Small Claims - because of its administrative set up as part of the Court of Requests, it seems to me that you don't necessarily have to have it in the same location (though it's obviously desirable). But if you are going to do that you have to look at the facilities for the public, even more so for the Small Claims Court because it's a people's court where people conduct their own cases. They ask their own questions; they produce their own evidence. If you're not catering to the people to come before the Court you're failing in my view.

Mr Hemming also commented in great detail about the importance of physical setting especially for Small Claims. In the arrangement of the room, the Hobart Small Claims Court is Tasmania's best. The parties face the Court rather than each other, though the chairs are swivelled so that they can face each other for questioning if necessary. The Magistrate is slightly elevated, but not nearly so much as in an ordinary Court.

Some Court staff were either reluctant to talk about facilities while others appeared moderately satisfied with layout. Most Court staff acknowledged that things could be better.

Below is a summary of the observations made by the researcher when visiting the Small Claims Court in Hobart:

FURNITURE: The table arrangements seemed adequate and were well spaced out so that parties could spread their materials and move about easily in the

room. The chairs were swivel type office chairs which made it easy to manoeuvre. However, the width of the tables and the distance from the Magistrate presents problems. In order for the parties to hand up photos and for the Magistrate to hand anything to the parties, they have to get up from their seats and walk around the table. This was awkward and time consuming. Future courtroom designs might consider moving the Magistrate closer to the parties and making the disputant tables more narrow. Or, perhaps a semi-circle type arrangement of tables might be considered.

LIGHTING: The lighting was noticeably poor. This is especially so given the age and likely reduced eye sight of some litigants. Also, there appeared to be a problem with close examination by the parties of legal documents, quotes for repairs and other written items. When asking the Magistrate about this he agreed that the lighting was inadequate, but noted that it was worse before he had several lights added.

ACCOUSTICS: While it was easy to hear the parties in a room the size of the hearing room, it was also easy to be distracted by noise coming from the waiting room. I could hear children and others talking outside. (This is despite additional sound panelling put in by request of the Magistrate). I also assume that witnesses waiting outside could hear what was going on in the hearing room. This presents a problem for witnesses who should not be able to hear previous testimony before presenting their evidence. Also, below the hearing room is a shop which sells stereo equipment. Thus, occasionally, the hearing room is pierced by the sound of music caused by customers testing the volume ranges of speakers.

AMENITIES: A pitcher of water and glasses were available in the hearing room. However, a pad and pen would also be useful, though most litigants had their own materials.

DEMONSTRATIVE EVIDENCE: A white board with car magnets was available at times, there being only one board and set of magnets available to service two courtrooms. In addition to another white board, additional magnets should also be supplied so that photos and other evidence might be displayed, especially if witnesses and other parties are to be asked about them.

SEPARATE ROOM FOR SETTLEMENT POSSIBILITIES: Court officials might consider having the Magistrate first meet litigants more informally in a

room other than the hearing room to discuss the possibility of settlement. In this way, parties would clearly distinguish the informal settlement phase from the formal hearing phase of Small Claims proceedings. Perhaps this would also be a nice opportunity to give the parties a cup of coffee and opportunity to settle.

WAITING ROOM: There is a waiting room for litigants. Litigants are asked to ring a bell when they enter to let the Court staff know they have arrived. Parties are ushered in to the Hearing room by the Court secretary who ascertains their name and any other problems, eg need for interpreters, number of witnesses etc. The waiting room has even worse lighting than the courtroom. It is a singularly dreary atmosphere. There is little reading material available. One toilet is just outside the door to the waiting room, the other one is down stairs. There is no public phone readily available, although the Court personnel indicate they would allow the use of the office phone if asked. No coffee or other refreshments are available though there is a cafe located on the street level just below the hearing room.

ACCESS TO HEARING ROOM: As of February 89, the street sign leading up to the stairway for the hearing room was far too small, especially, given the fact that some people would have poor eyesight. It would also not be readily visible from a car should one be looking for the Court from a vehicle.

PARKING: At the time of the study parking was a major problem in the downtown Hobart area in which the Court is located. However, recently several new car parks have been constructed in the area, thus alleviating the problem.

COURTROOM NO 8. WORKER'S COMP ROOM: Sometimes Small Claims hearings were conducted in the Worker's Compensation Hearing Room. This room is less appropriate for informal atmosphere required of Small Claims. It is bigger. There is far greater physical separation between parties and Magistrate. The microphones and related equipment are off-putting. To use the equipment requires the secretary, with headphones on to interpose between the litigants and Magistrate. The fan was on when I was there. It was noisy and somewhat distracting. Parties had to consciously speak up at volume levels beyond normal conversation.

ARRANGEMENTS FOR PHYSICALLY CHALLENGED/HANDICAPPED: The steep stairway going up to the hearing room would be an insurmountable obstacle for any litigant in a wheel chair or with severe physical impairments that

made it difficult to walk. Interviews with the Court administrator³ indicated that an alternative court site could be used if the problem were brought to their attention. Perhaps something on the claim form and summons should bring the possibility of this arrangement to the litigants who might have difficulty.⁴

FILING COUNTER: The staff at the Court all seem helpful and friendly. Partitions are located at the counter to ensure a modicum of privacy. Also, should a litigant request complete privacy, a room is available, but this is not generally known and some litigants may feel there is insufficient privacy.⁵

Northern Tasmania

Mr Hill⁶ also commented on the adequacy of facilities in the two other Tasmanian regions:

Question: What about the facilities in the North and NW?

Answer: Well I practiced for 13 years in Launceston and the facilities are good, but not for Small Claims. In my experience they have not been altered in any way to try to cater for Small Claims. I think there has to be some sort of philosophical acceptance that there is a different theme behind the Small Claims Court than there is behind the ordinary civil Court. If you want to keep it as a Court ok, but you have to show people it is their Court and they can relax in it. If you are going to old stone buildings with the gaols in the back, it is not going to do much to encourage people or make them feel relaxed. Devonport wasn't too bad. Burnie again is the Supreme Court Building as well. There are

3 Informal interview with Mr Barry Hamilton, who was then the Registrar of Small Claims, Summary of Interviews, s 4.

4 A recent conversation with the Registrar indicated that such a notice is now provided.

5 Note the recommendation in Wales of complete sound proofing booths. See *Courting the Consumer: A Study of Access to the County Courts in Wales* (October 1988) (Cyngor, Defnyddwyr, Cardiff, Welsh Consumer Council).

6 Personal Communication with Mr Hill, as noted above, Summary of Interviews, s 3.

problems in this area and I think there needs to be some addressing of this philosophical approach to Small Claims Court. Although Small Claim litigants are part of the Court system they shouldn't be made to feel that way. It gets back to political will - whether one is prepared to spend the money to provide proper facilities consistent with the philosophy of a Small Claims Court.

Based upon the researcher's observations and interviews, it was clear that in Launceston, despite almost doubling the number of small claims in 1989 (261 in '88 vs almost 400 in '89) there appears to be few resources given to the management of the Small Claims Division.

FILING COUNTER: There was not a single sign indicating the existence of the Small Claims. Parties evidently are expected to know that small claims are handled in the same place as Court of Requests matters. Even inside the building there is no counter, sign, informational materials or any other designation referring to the Small Claims Court. Once parties do find the appropriate window (highlighted by a sign labelled "All Enquiries") if they need help filling out the form Mr Bill Leary⁷ assists them in private which ensures both privacy and confidentiality. There are no provisions for interpreters, though I am told no one has ever asked for such assistance.

WAITING ROOM: Small Claims litigants wait out in the hall for their name to be called. Again, this could be embarrassing as Small Claims disputants are mixed in with Court of Requests and Petty Sessions litigants. Petty Sessions especially, with a significant number of criminal defendants awaiting trial, is hardly a welcome invitation to utilise the Small Claims Court. The hallway in which litigants must wait is noisy and uncarpeted. Rooms are available just off the main courtroom for litigants to confer, though most Magistrates leave the courtroom and allow litigants to confer there.

AMENITIES: There is a phone, soft-drink machine and toilet facilities. No child care services or reading material are provided. Parking is rather difficult. There is a parking lot with all day parking for \$1.50 close by, but it tends to be

⁷ Deputy Registrar of Small Claims in Launceston and which whom I had several formal and informal interviews in Feb-March 1990.

full by 9am. Off street parking is limited and generally available only for two hours.

PHYSICALLY CHALLENGED/HANDICAPPED: While there is a lift up to the courtroom on the second level up, there are steep stairs to climb to get to the Enquiry Windows. If a litigant asks for it, a lift is available to enter the building on the ground level, though the switches are located so high up that a person in a wheel chair could not reach them.

HEARING ROOM: Launceston uses the ordinary court with the Commissioner sitting not at the bench, but just above the parties who are seated at a table across from each other. The obvious formality of the room (size, jury box, microphones, etc) would add to the nervousness of litigants, a fact confirmed by the Court personnel with whom I visited.

DEMONSTRATIVE EVIDENCE: A white board is available, but it is fixed to the wall far removed from the table where the litigants sit.

Northwest Tasmania: Devonport

SIGNS: To my surprise, and to Mr Rickwood's (Registrar), there was not a single sign anywhere referring to the Small Claims Court. There is however, a small sign, barely visible from across the street from the Court Building, referring to the Court of Requests and Court of Petty Sessions. When one enters the building from the side there is a paper sign, poorly placed, which states "ALL ENQUIRIES AND PAYMENTS UPSTAIRS." Immediately below that is a more permanent sign indicating "Magistrate and Registrar upstairs". This is the poorest notice given in any of the Small Claims Courts and must engender confusion to those involved in approximately 200 cases in the Small Claims Court in this Region each year.

ENQUIRY COUNTER: Assuming one makes it up the two flights of steep stairs and goes to the Registrar's Office, there is little privacy or confidentiality. However, assuming one does have a query over the claim, he or she will be able to meet Mr Rickwood, the Deputy Registrar who appeared most helpful and informed.

WAITING ROOM: While there is a waiting room, Small Claims disputants and people before Petty Sessions alike use it at the same time. According to Mr Rickwood, this is most unsatisfactory, especially on lockup day, and would be

psychologically intimidating. While there is some reading material in the waiting room, coffee and other confectionaries are not available in the building. One of the waiting rooms had a broken office chair in it. The seating otherwise was rather uncomfortable - plastic covered, padded benches with a wooden rail to lean one's back against. There is a milk bar close by. There also is a problem of overcrowding and maintenance. Mr Rickwood pointed out that on a busy day there is so much rubbish (cups, papers etc) about that the room is in a 'disgusting state'. Perhaps it could be arranged to have the room cleaned more than once on these days. The waiting room is also outside a courtroom and the echoes from the hall must be disturbing to the proceedings going on in Court. No public phone is available in the building, the nearest one being in the Mall over a block away. The rooms are well lit, but dreary, and with little information, posters or other material on the walls. Parking is generally available

CONFERENCE/SETTLEMENT ROOM: There is generally no room available for litigants to confer about the possibility of settlement. As Mr Rickwood explained it, the Magistrate usually leaves the Hearing Room and gives the parties the opportunity to confer. Given the primary role of Small Claims to bring parties to an agreement, such conference facilities should be made available.

HEARING ROOM: The hearing room itself is commendable for its informality. It is in reality a small library with a long table and large desk with 6 chairs lining the wall at the back. Again, there is no sign to indicate that the room serves as a hearing room for Small Claims. The chairs are padded and reasonably comfortable, but swivel ones would be better. The room is generally well lit and heated, but there is no facility for demonstrative evidence - a big failing considering that approximately 40% of the cases are motor vehicle accident cases. Acoustics appear to be adequate, though there is a little traffic noise from the street outside.

FACILITIES FOR THE PHYSICALLY HANDICAPPED/CHALLENGED: There is no lift in the building and the two steep flights of stairs would be a considerable obstacle to any elderly or physically disabled person.

MIGRANTS: Unlike the Hobart counter, there is no information about availability of interpreters, etc. Indeed, there is no information of any kind about Small Claims.

Northwest Tasmania: Burnie

HEARING ROOM: Burnie, like Launceston, utilises a traditional courtroom to hear small claims. Again, such an atmosphere is too formal, large and intimidating for Small Claims hearings.

CONFERENCE/SETTLEMENT ROOMS: Several rooms were available for possible conferences. However, it was unclear how often they were used for this purpose.

SIGNS: There were few signs or posters specifically devoted to Small Claims

GENERAL AMENITIES: The Burnie Court building is an attractive and well maintained location. The size of the Burnie community is such that most disputants would have little difficulty either finding the building or getting access to it. Several shops are readily accessible where disputants could obtain food and drink. Parking was also readily available with a large parking lot close by.